Supreme Court, U.S.
FILED

99 7.7. JUL 8 - 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

TONY G. TURPIN, WARDEN,
Georgia Diagnostic and Classification
Center,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The question in this case involves a conflict between the highest courts of Georgia and Mississippi and was expressly reserved by this Court in *Murray v. Giarrantano*, 492 U.S. 1 (1989) and *Coleman v. Thompson*, 501 U.S. 722 (1991):

> Whether the Constitution permits the State to force a borderline mentally retarded death-row inmate who is without counsel to represent himself in state habeas trial court proceedings when those proceedings are his only opportunity to prove fundamental constitutional claims.

PARTIES TO PROCEEDING

The caption of the case contains the names of all parties to this action.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Exzavious Lee Gibson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The opinion of the Georgia Supreme Court denying Petitioner's Motion for Reconsideration (Appendix filed concurrently herewith ("App.") at A71) is not reported. The opinion of the Georgia Supreme Court (App. at A1) is reported at 270 Ga. 855, 513 S.E.2d 186 (1999). The opinion of the Superior Court of Butts County, Georgia (App. at 31) is not reported.

JURISDICTION

The opinion of the Georgia Supreme Court denying Petitioner's Application for Certificate of Probable Cause to Appeal was entered on February 22, 1999 (App. at 71). The opinion of the Georgia Supreme Court denying Petitioner's Motion for Reconsideration was entered on April 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §

1257, Petitioner having asserted below and herein a deprivation of his rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

The Eighth Amendment to the United States Constitution provides, in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No . . . State [may] deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The text of 28 U.S.C. §§ 2244 and 2254, which reflect amendments contained in the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") are set forth in the Appendix (App. at A72, A76). The text of Georgia Uniform Superior Court Rule 44 is set forth in the Appendix (App. at A79).

STATEMENT OF THE CASE

Exzavious Lee Gibson is the first death-row inmate in the modern era of the death penalty to be forced to proceed without counsel at his habeas evidentiary hearing. Mr. Gibson, who is borderline mentally retarded and repeatedly begged the habeas trial court to appoint counsel, was forced to fend for himself at an unfair and one-sided proceeding to determine whether the lawyer who had represented him at trial and on appeal provided effective assistance. State

habeas was Mr. Gibson's only opportunity to prove violation of fundamental constitutional rights, such as the right to effective assistance of counsel. After considering this case for almost two years, a closely-divided Georgia Supreme Court, in direct conflict with the Mississippi Supreme Court, refused to find a right to counsel in these circumstances.

Mr. Gibson now asks the Court to recognize that states owe some minimal process to indigent capital habeas petitioners when they properly seek to raise constitutional claims for the first time. Fundamental rights such as effective assistance of counsel are rendered meaningless without a remedy. This case presents an opportunity for the Court to rule on a question it has expressly left open, to address important due process, equal protection, and federalism issues badly in need of its authoritative voice, and to resolve a conflict among lower courts.

I. THE STATE HABEAS TRIAL COURT

On December 20, 1995, Mr. Gibson, who has an I.Q. of between 76 and 82 (App. at A21), filed *pro se* a "skeletal" petition for the writ of habeas corpus in the Superior Court of Butts County, Georgia.[1] (R2-I). This petition was a generic, form pleading and did not contain any particularized allegations relating to Mr. Gibson's claims. It was identical to form petitions that had been filed by ten other death-row inmates and simply raised issues that are routinely litigated in state habeas proceedings. No attorney ever investigated

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[1] The direct review of this case is not necessary to understand the issues presented in this Petition, and can be briefly summarized. Mr. Gibson was convicted by a jury of murder and armed robbery and was sentenced to death on the murder conviction and to life imprisonment for the armed robbery. The Georgia Supreme Court affirmed the conviction and death sentence, *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991), and certiorari was denied by this Court. *Gibson v. Georgia*, 502 U.S. 1101 (1992). The same attorney represented Mr. Gibson at trial and on appeal.

Mr. Gibson's case or formulated issues for meaningful review.

At about the time Mr. Gibson filed his petition, Georgia enacted new expedited procedures for capital habeas cases.[2] Because these new rules did not take effect until January 1, 1996,[3] Mr. Gibson's petition should not have been subject to the new expedited procedures, and he should have had sufficient time to locate volunteer counsel.

Although Mr. Gibson's petition was filed before the effective date, the Superior Court held that the new expedited rules applied and placed Mr. Gibson's habeas petition on a fast track. (R9, R19, R27). In response to the State's motion to set a scheduling order -- which was filed only after the State learned that Mr. Gibson did not have an attorney -- the Superior Court scheduled an evidentiary hearing, leaving Mr. Gibson only four days to file pretrial motions and approximately one month to amend his petition. (R16).

On September 12, 1996, Mr. Gibson's case was pushed to an evidentiary hearing before volunteer counsel could be found to represent him. At the hearing, Ms. Elizabeth Wells, a staff attorney with the Georgia Appellate and Educational Resource Center (the "Resource Center"),[4] appeared as amicus curiae (behind the bar) and pleaded with the court to grant a short continuance until volunteer counsel could be secured. (App. at A95-A104). The court refused to entertain argument regarding a continuance despite Mr. Gibson's obvious need, and proceeded with one of the most unfair and one-sided evidentiary hearings imaginable:

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2 Georgia Uniform Superior Court Rule 44 (App. at A79).

3 Ga. Code. Ann. § 9-14-47.1.

4 The Resource Center is a not-for-profit organization that tracks and monitors capital litigation in Georgia. (App. at A2 n. 1).

The Court: Okay. Mr. Gibson, do you want to proceed?

Mr. Gibson: I don't have an attorney.

The Court: I understand that.

Mr. Gibson: I'm not waiving any rights.

The Court: I understand that. Do you have any evidence you want to put up?

Mr. Gibson: I don't know what to plead.

The Court: Huh?

Mr. Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything, I'm just asking you if you have anything you want to introduce to this Court.

Mr. Gibson: But, I don't have an attorney.

The Court: Yes, sir. Do you have anything you want to tell this Court?

Ms. Wells: Your Honor.

Mr. Gibson: I don't waive my rights.

The Court: Yes ma'am.

Ms. Wells: My name is Elizabeth Wells. I have filed a number of motions in this Court as Amicus Curiae. If I could be heard for a moment.

The Court: No, ma'am, have a seat. Mr. Gibson, do you have anything you want to tell this Court?

Mr. Gibson: I don't waive any rights. . . .

The Court: . . . Mr. Gibson, I will be glad to listen to anything you want to tell me, anything you want to say. I judge you have nothing you want to say or nothing you want to tell me. Is that correct? Except what is in your petition.

Mr. Gibson: I don't have an attorney.

(App. at A94-A95). The court then deemed Mr. Gibson's case in chief to be closed and turned to the State for its presentation. (App. at A95, 105). The State conducted its examination of Mr. Gibson's trial counsel. Of course, Mr. Gibson was unaware of when or how to object. Finally, when the State began a line of questioning regarding whether Mr. Gibson had said anything to his attorney that would incriminate him in the crimes for which he was convicted, the court asked Mr. Gibson: "[D]o you have any objection to Mr. Mullis testifying to what you told him?" "Your Honor," replied Mr. Gibson, "I don't know what to do, I don't have an attorney." (App. at A114). And the court allowed the improper questioning to proceed. (App. at A115).

The examination continued, predictably without any objection from Mr. Gibson. Some time later, the Court finally asked Mr. Gibson whether he had any objection to a document proffered by the State, and the resulting colloquy was typical of virtually every exchange in the proceedings:

> The Court: Okay. Any objection, Mr. Gibson?
>
> Mr. Gibson: Your Honor, I don't waive any rights, but I don't have counsel, so I don't know what to say about anything you have asked me or anything you will ask me.
>
> The Court: Okay. Okay. They're admitted.

(App. at A142-A143). When direct examination of Mr. Mullis finally concluded, Mr. Gibson's "chance" to cross examine him arose:

> The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?
>
> Mr. Gibson: I don't have any counsel.
>
> The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?
>
> Mr. Gibson: I'm not my own counsel.
>
> The Court: I'm sorry, sir, I didn't understand you.

Mr. Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, yourself, individually, want to ask him anything?

Mr. Gibson: I don't know.

The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.

Mr. Mullis: Thank you.

[State's Attorney]: Your Honor, I would like to at this time inquire of Mr. Gibson the circumstances of filing his petition.

Ms. Wells [from behind the bar]: Your Honor, this is improper, [State's Attorney] can't ask --

(App. at A144-A145). And with that, the court had Ms. Wells physically removed from the courtroom by a Sheriff. (App. at A146).

After the State's Attorney completed her improper questioning of Mr. Gibson, the hearing concluded. Mr. Gibson tendered no evidence, examined no witnesses, and made no objections. Indeed, he was not even provided with a pen until it was brought to the court's attention that he did not have one. (App. at A104-A105).

Approximately five months later, the court signed an order that had been drafted by the State and submitted *ex parte*. (App. at A31). The order rejected Mr. Gibson's claims, including *inter alia* his substantial ineffective assistance of counsel claims. With respect to Mr. Gibson's request for the assistance of an attorney, the Superior Court held that there is no right to counsel in state habeas under the United States Constitution. (App. at A35-A38).

In addition, the court found: "It is clear to this court, given Petitioner's demeanor and his statements at the evidentiary hearing, that Petitioner made a conscious choice not to proceed with his case at the evidentiary hearing." (App. at A35). This purported finding is followed by several

citations to the transcript where Mr. Gibson pleaded for an attorney.

Mr. Gibson's statements reflect a person with an I.Q. of 76 who is bewildered and confused by what was taking place. The conclusion that they reflect a "conscious choice not to proceed" is simply the type of one-sided outcome that can be expected when habeas petitioners are forced to fend for themselves at evidentiary hearings.

II. THE GEORGIA SUPREME COURT

After the habeas trial court issued its opinion, the undersigned counsel learned of the case and agreed to represent Mr. Gibson *pro bono* on an application for discretionary review by the Georgia Supreme Court. Counsel for Mr. Gibson filed plenary briefs arguing that Mr. Gibson was entitled to an attorney in the state habeas trial court proceedings. These briefs were based on the United States Constitution, the Georgia Constitution, and state common law. The State filed a brief in response.

After nearly two years of review, a narrow majority of the Georgia Supreme Court rejected Mr. Gibson's claims.[5] (App. at A1). The four-member majority denied Mr. Gibson's due process and equal protection right to counsel arguments on the grounds that "there is no state or federal constitutional right to an appointed lawyer upon habeas corpus . . . ." (App. at A1). Three members of the Court dissented on the grounds that "both the state and federal constitutions require appointment of counsel for a death penalty inmate who is pursuing his first habeas corpus petition and who is seeking to challenge his conviction and sentence on a basis not available on direct appeal." (App. at A20). In short, the Georgia Supreme Court expressly ruled

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[5] Although the Supreme Court declined to grant oral argument for, and formal review of, this case, the issues were fully addressed in the substantial briefs submitted by the parties, and the court expressly reached the merits of the federal constitutional issues. *Gibson v. Turpin*, App. at A1, A3-A12; *see also id.* at A20, n. 1 (Fletcher, P.J., dissenting).

on a federal constitutional issue that is reviewable by this Court.

The dissenters further concluded, in language echoing widespread criticism of the majority's result by several other courts and commentators:

> [F]undamental fairness demands that a condemned prisoner have the benefit of competent counsel to articulate his constitutional claims and to navigate the procedural and substantive morass that is our habeas corpus law. If this were not so, all states but one that impose the death penalty would not require counsel in these cases. Nevertheless, the majority today joins that one state and requires a condemned man, without counsel, to bring his claims for relief in an arcane process that he can not possibly understand in a court of law that (most likely) will not be able to understand his constitutional concerns. This is an outcome that no just government should countenance.

(App. at A30). On April 9, 1999, the Georgia Supreme Court denied Mr. Gibson's Motion for Reconsideration. (App. at A71).

SUMMARY OF REASONS FOR GRANTING THE PETITION

This case squarely presents a question expressly reserved by the Court in its two most recent decisions on the right to habeas counsel and that has created a conflict between the Supreme Courts of Georgia and Mississippi: Whether the Constitution permits a state to force an indigent capital petitioner who is without counsel to represent himself in state habeas proceedings when those proceedings are the petitioner's first and perhaps only opportunity to raise fundamental constitutional claims.

Mr. Gibson is the first person in the modern era of the death penalty to be forced to proceed through state habeas, including an evidentiary hearing, without any assistance of counsel. This case is particularly important because the state

habeas trial court was Mr. Gibson's first and perhaps only opportunity to raise important issues, such as his fundamental constitutional right to effective assistance of counsel, suppression of exculpatory evidence, and other issues that cannot be presented at trial or on direct appeal.

The constitutional right to effective assistance of counsel at a criminal trial and first appeal is well established and particularly important because it safeguards the integrity of the criminal justice system. This Court's cases establish that criminal defendants must have an opportunity to present their claims fairly within the adversary system, which in the case of a mentally-limited person like Mr. Gibson means that they must have had the assistance of an attorney in presenting their claims once. Ineffective assistance claims cannot be raised on direct review in Georgia, and must be raised for the first time in state habeas. The right to effective assistance demands a meaningful opportunity to present ineffective assistance of counsel claims. What process the State must provide to ensure this meaningful opportunity is the very question left open by the Court.

This question must be addressed because a petitioner who is without counsel and is nonetheless forced to proceed in state habeas loses the opportunity to present constitutional claims thereafter. The rules of exhaustion and procedural default preclude a petitioner from raising in federal habeas claims that have not been preserved. Further, the newly-amended federal habeas statute places virtually exclusive reliance on the state habeas evidentiary hearing -- no new hearing will be granted in federal court in most circumstances. Accordingly, without counsel to develop facts supporting, for example, an ineffective assistance claim, petitioners such as Mr. Gibson lose forever the ability to present this fundamental constitutional right fairly within the adversary system.

This Court has afforded states broad discretion in administering their capital punishment systems and has emphasized the importance of the states' role in resolving

constitutional challenges to death sentences. However, with this deference comes obligations. If Georgia is to impose the death penalty, then it must implement procedures to protect the integrity of its system by ensuring that death-row inmates have an opportunity to, *inter alia*, test the constitutionality of trial counsel's performance. Even if Georgia is not required to provide counsel to capital habeas petitioners, this Court should decide whether it has an obligation not to expedite cases where good-faith efforts to secure counsel are underway.

The outcome of this case, and those that are accumulating in its wake, is shocking and raises substantial due process, equal protection, and federalism concerns. Litigants and the public cannot be expected to have confidence in the type of hearing conducted below. The public interest will be well served by the Court granting certiorari to resolve the question it has expressly reserved.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION PRESENTED IS IMPORTANT

A. The Court Has Expressly Reserved Ruling On This Issue

In *Murray v. Giarrantano*, 492 U.S. 1 (1989) and *Coleman v. Thompson*, 501 U.S. 722 (1991), the Court expressly reserved the issue presented by this case: whether there are certain circumstances in which a state must provide counsel, or other assistance, to a death-row inmate who is incapable of representing himself in state post-conviction proceedings that offer his only opportunity to present certain claims.

Giarrantano considered whether Virginia's scheme for the provision of counsel in its post-conviction process violated the right to meaningful access set forth in *Bounds v. Smith*, 430 U.S. 817 (1977). Virginia death row inmates had brought a § 1983 action to compel Virginia to provide them

with counsel in their collateral proceedings. At that time, Virginia did, in fact, provide some assistance of counsel to inmates. "Unit attorneys" had been appointed by Virginia to the prisons to assist inmates. Moreover, Virginia law authorized courts to appoint counsel, and the Court noted that such appointments had been made upon request before the filing of any habeas petition. *Giarrantano*, 492 U.S. at 10 n. 5. A splintered Court held that Virginia's scheme for appointment of counsel did not violate *Bounds*. A four justice plurality would have held that there is no right to counsel in a state habeas hearing. *Id.* at 12.

The deciding fifth vote was cast by Justice Kennedy, who expressly left open the very issue now before the Court:

> While Virginia has not adopted procedures for securing representation that are as far reaching and effective as those available in other States, *no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief.* I am not prepared to say that this scheme violates the constitution.

Id. at 14-15 (emphasis added). As Justice Kennedy supplied the fifth vote in *Giarrantano*, and concurred on grounds narrower than those put forth by the plurality, his position is controlling. *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in *Caldwell*, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.") (Rehnquist, C. J.); *see also Marks v. United States*, 430 U.S. 188, 193 (1977).

Unlike the petitioners in *Giarrantano*, Mr. Gibson was unable to obtain counsel to represent him and was forced to fend for himself at a habeas evidentiary hearing. Further, Mr. Gibson is borderline mentally retarded and, unlike Virginia, Georgia's prison system is not staffed with

institutional lawyers to assist in preparing petitions for post-conviction relief.

In *Coleman*, the Court examined whether errors committed by Coleman's counsel on appeal from the state habeas trial court constituted sufficient "cause" to excuse a procedural default that had occurred on appeal. Finding no right to effective *appellate* counsel on habeas appeal, the Court concluded that "cause" had not been established. *Coleman*, 501 U.S. at 756. However, the Court expressly left open the question presented by this case:

> *Finley* and *Giarrantano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, *there must be an exception to the rule of Finley and Giarrantano in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court.* The effectiveness of Coleman's counsel before that Court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Id. at 755 (emphasis added).

This case presents precisely the circumstances reserved in *Coleman*. Georgia's collateral review is the first place Mr. Gibson could present certain challenges to the constitutionality of his conviction and sentence. He did not have counsel in the habeas trial court to raise claims and present evidence necessary to vindicate important constitutional rights that had never been heard by any court.

Accordingly, in both *Giarrantano* and *Coleman*, the most recent decisions on this issue, the Court recognized the difficulty of denying counsel at the first opportunity to present ineffective assistance claims, and expressly left the question open for another day.

Earlier decisions also leave this question open, and foreshadow the difficulty of Mr. Gibson's case. In holding that defendants have a right to counsel on appeal, the Court in *Douglas v. California*, 372 U.S. 353 (1963), anticipated the problem of not having a lawyer at the first opportunity to present a claim:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court.

Id. at 356. Similarly, in holding that the right to counsel did not extend to discretionary appeals, the Court in *Ross v. Moffitt*, 417 U.S. 600 (1974), expressly contemplated that all claims would have already been presented at least once by a lawyer:

> At that stage he will have, at the very least, a transcript or other record of trial court proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. . . . *Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision . . . should be able to ascertain whether his case satisfies the standards established by the legislature for such review.*

Id. at 615 (emphasis added).

Finally, in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court determined that the requirements appointed counsel must follow when withdrawing from a case[6] did not apply to withdrawal of counsel appointed in the state habeas trial court. *Finley*, 481 U.S. at 555. The petitioner in *Finley*, after completing the direct review process, had filed a petition for state post-conviction relief in which she raised the same issues that the Pennsylvania Supreme Court had already rejected on direct review.[7] The Court was not confronted with a petitioner's attempt to raise issues that could only be raised for the first time in the state habeas trial court.

Accordingly, *Finley* involved neither the core right to counsel nor a petitioner's first opportunity to raise ineffective assistance claims. Importantly, the Court in *Coleman*, recognized that *Finley* did not resolve the issue of whether a right to counsel exists "in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755.

This case squarely presents that issue. Mr. Gibson is the first person in any state in the modern era of the death penalty to be forced to represent himself in state habeas trial court proceedings. Petitioners in numerous cases have initiated actions seeking the appointment or payment of counsel, or challenging the effectiveness of habeas counsel. The common denominator in these case, however, is that some form of counsel was provided. In each of these cases, counsel was either mandated by rule, available as a matter of fact, or the case was stayed until counsel could be secured.

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[6] *See Anders v. California*, 386 U.S. 738 (1987).

[7] Pennsylvania was one of the few states to permit litigants to raise post-conviction claims that had already been reviewed once.

B. Fundamental Constitutional Rights Are At Stake

1. *Indigent Defendants Are Entitled To An Opportunity To Present Their Claims Fairly Within The Adversary System*

The Court has long recognized that a criminal defendant is entitled to an attorney to present claims of constitutional error. "[F]undamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversary system." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985) (quotation omitted); *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Nearly all constitutional claims must be raised at trial or on appeal, where attorneys are required. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Douglas v. California*, 372 U.S. 353, 356-57 (1963). Defendants are not, by contrast, entitled to an attorney on discretionary appeals because they already would have had the benefit of an attorney's assistance in presenting their claims. *Ross v. Moffitt*, 417 U.S. 600 (1974).

State habeas is the first opportunity to raise several fundamental constitutional claims such as ineffective assistance of counsel, failure to produce exculpatory evidence, jury misconduct, and knowing use of perjured testimony. To deny any assistance by an attorney in presenting these claims is to deny a criminal defendant an adequate opportunity to vindicate fundamental constitutional rights.

2. *State Habeas Was Mr. Gibson's First Opportunity To Present His Fundamental Right To Effective Assistance Of Counsel*

Mr. Gibson's skeletal petition raised for the first time a claim for ineffective assistance of his trial counsel. The constitutional right to effective assistance of counsel at trial and first appellate review is well-established. *E.g., Strickland*

v. Washington, 466 U.S. 668, 686 (1984) ("[T]he right to counsel is the right to the effective assistance of counsel.") (quotations omitted); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). The right to effective assistance of trial counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment because it protects the fundamental right to a fair trial. *Strickland*, 466 U.S. at 684-85. "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685.

State collateral review is an essential part of the review process. In most states, including Georgia, ineffective assistance of counsel claims cannot be raised on direct appeal unless there has been a change of counsel from the trial court. *E.g.*, *Castell v. Kemp*, 254 Ga. 556, 558, 331 S.E.2d 528, 530 (1985).

State habeas is, therefore, the first opportunity to raise ineffective assistance claims. This makes practical sense because facts necessary to prove ineffective assistance claims typically do not exist in the trial record and an evidentiary hearing is necessary to establish a factual predicate for such claims. As this Court has recognized:

> Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. . . . Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. Were we to . . . hold that criminal defendants may not raise [certain] ineffective-assistance claims . . ., we would deny most defendants whose trial attorneys

> performed incompetently in this regard the opportunity to vindicate their right to effective trial counsel.

Kimmelman v. Morrison, 477 U.S. 365, 378 (1986). "As this Court has constantly emphasized, habeas corpus . . . actions are of fundamental importance in our constitutional scheme because they directly protect our must valued rights." *Bounds v. Smith*, 430 U.S. 817, 827 (1977).

C. The Decision Below Signals The Elimination Of Fundamental Constitutional Rights For Indigent Capital Petitioners Who Cannot Secure Volunteer Counsel

The issues in this case are particularly important because the Georgia Supreme Court's decision eliminates for indigent death-sentenced persons who do not have counsel not only the *first* opportunity to raise certain constitutional claims, but also *any other* opportunity to raise these claims. By denying a petitioner an attorney -- or a reasonable continuance to secure volunteer counsel -- for state habeas when that proceeding is the first opportunity to raise fundamental claims, the State is virtually guaranteeing that these claims will never be heard.

1. *Without A Lawyer, A Death Row Inmate Is Incapable Of Raising Claims Or Proffering Evidence In Support Of Those Claims*

Without a lawyer, a capital habeas petitioner is virtually guaranteed to fail to raise fundamental constitutional claims such as ineffective assistance of counsel and, even if raised, to develop facts supporting those claims. As discussed *supra*, this Court's precedent properly recognizes that a constitutional right is meaningless without a lawyer to vindicate those rights.

The recognition that lawyers are necessary to vindicate constitutional rights applies with special force in post-conviction capital cases. It is axiomatic that death-row inmates -- especially those who are borderline mentally

retarded -- are totally incapable of representing themselves in the state habeas trial court. Capital post-conviction representation is one of the most complex areas in the law: "The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *McFarland v. Scott*, 512 U.S. 849, 855-56 (1994); *see also Murray v. Giarrantano*, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting) ("[T]his Court's death penalty jurisprudence is unquestionably difficult even for a trained lawyer to master."). As put by Judge Godbold, former Chief Judge of the Eleventh Circuit, "[T]he average trial lawyer, no matter what his or her expertise, doesn't know any more about habeas than he does about atomic energy."[8]

The resources necessary to present a capital habeas case render it physically impossible for death row inmates to represent themselves, even if intellectually and emotionally capable. Lawyers devote on average 600 to 900 hours on habeas trial court proceedings,[9] and nearly all of this time is spent on activities beyond the reach of death row inmates in Georgia. Death-row inmates are allowed out of their cells only on weekdays and only for three hours per day. During this time, they do not have access to a law library -- if an inmate wants to perform legal research, he must request a particular case and that case will be brought to him.

Further, investigation and preparation of a case for habeas typically goes well beyond legal research and record evidence. A minimally-competent investigation for purposes

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[8] "You Don't Have To Be A Bleeding Heart," dialog between Judge Abner Mikva and Judge John C. Godbold, 14 Human Rights 22, 24 (Winter 1987).

[9] The Spangenberg Group, "Time and Expense Analysis in Post-Conviction Death Penalty Cases" (February 1989), at 15; The Spangenberg Group, "Study of Capital Cases in Virginia" (November 1988) at 19; The Spangenberg Group, "Time and Expense in Post-Conviction Death Penalty Cases in North Carolina" (June 1988).

of collateral review must identify evidence that would have supported claims not raised in the trial court or on direct review. This might include evidence that would have supported pretrial motions, evidence that shows other motions not pursued have merit, evidence that could impeach or discredit the State's case or support a defense, and evidence that should have been presented at the sentencing phase and that would have removed the case from death eligibility or made strong mitigating evidence. Death-row inmates have virtually no access to a telephone -- an indispensable tool in investigating evidence outside the record. They are only permitted to use the telephone to call people on their visitation list -- i.e., people who have agreed to take calls from the prisoner.

Moreover, when evidence in the hands of the police or prosecution cannot be secured through telephone calls or other investigation, litigation under the Open Records Act must be pursued. The only way to obtain documents under the Open Records Act is to physically go to the office where they are stored or pay for reasonable copying expenses. These options are unavailable to indigent prisoners because there is no excusal of fees for indigents and they obviously cannot leave death row and go to the appropriate office. *See McBride v. Wetherington*, 199 Ga. App. 7, 8 (1991).

In sum, it is beyond serious dispute that death row inmates cannot represent themselves in state habeas, and those who do are virtually guaranteed to omit important claims or evidence.

2. *Failure To Raise Claims Or Proffer Evidence Results In Waiver*

Under well-established habeas rules, a petitioner who fails to raise claims properly in state habeas will lose the ability to present those claims during federal habeas review. If a claim is not raised in the state habeas trial court, appellate courts properly could determine that it was procedurally defaulted, and the federal habeas court would be precluded from considering that issue. *E.g.*, *Coleman v.*

Thomson 501 U.S. 722 (1991); *O'Sullivan v. Boerckel*, 67 U.S.L.W. 4389 (June 7, 1999). If the procedural default is not caught by the appellate court, the federal district court properly could refuse to entertain it on the grounds that state remedies had not been exhausted. *E.g.*, *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam).

Since the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[10] federal courts are more limited in their ability to correct problems or constitutional deficiencies in the state process. The AEDPA increases the reliance federal courts must place on state habeas proceedings. The AEDPA continues to apply a presumption of correctness to the state habeas court's determination of a factual issue. 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting this presumption by clear and convincing evidence. *Id.*

Moreover, the AEDPA severely restricts the circumstances in which a federal court can hold an evidentiary hearing to develop facts necessary to meet this heightened standard of pleading. The AEDPA places nearly exclusive reliance on the state court's evidentiary hearing. Even if the state habeas evidentiary hearing is constitutionally defective, the AEDPA on its face precludes a federal evidentiary hearing unless the petitioner will present new facts that could not have been discovered at the time of the state habeas hearing and demonstrates that these facts establish actual innocence. 28 U.S.C. § 2254(e)(2).

The potential effect of these procedures is catastrophic where, as here, a petitioner does not have an attorney to develop a full and fair record in the state habeas evidentiary hearing. *Pro se* petitioners who lack legal training, have no financial resources, and are confined to death row are abjectly incapable of investigating and presenting claims.

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[10] 28 U.S.C. §§ 2244, 2254.

Yet the AEDPA asks only whether such claims *could have been discovered* through a reasonably diligent effort. Thus, meritorious claims that existed at the time of the state habeas hearing (and no doubt would have been discovered through an attorney's reasonably diligent efforts) may be lost forever.

It is a cruel fiction habeas petitioners can represent themselves. This fiction becomes shocking and unjust when the failure to raise claims precludes a petitioner from ever having the opportunity to vindicate a fundamental constitutional right. It becomes macabre when one considers that habeas relief was granted in nearly half of all capital cases between 1976 and 1991 because of constitutional error at trial.[11]

These issues are of extraordinary importance to the administration of justice and the integrity of the courts, which is why the Court has reserved the question presented. The outcome of this case is shocking and raises substantial due process, equal protection, and federalism concerns. The public interest will be well served by the Court granting certiorari.

II. LOWER COURTS ARE IN CONFLICT

State and federal courts have struggled with the issues presented in this Petition and have reached conflicting results. Although no court outside of this case has ever been faced with a petitioner who was forced to proceed through state habeas corpus proceedings without counsel, courts have confronted cases in which actual or potential habeas petitioners claimed that they were entitled to the appointment of counsel.

The Mississippi Supreme Court recently decided a case in direct conflict with the Georgia Supreme Court's decision below. In *Jackson v. Mississippi*, ____ So.2d ____, 1999

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[11] *McFarland v. Scott*, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting); *Gibson v. Turpin*, 270 Ga. 855, 513 S.E.2d 186 (1999) (Fletcher, P.J., dissenting).(App. at A23).

WL 33904 (1999) (App. at A82), the Mississippi Supreme Court held that state habeas petitioners have a right, under the United States Constitution, to an attorney in state habeas trial court proceedings. App. at A82, A87-88.

The court in *Jackson* based its conclusion on the constitutional right to equal access to justice enunciated in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) ("[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.'"). The court concluded: "Access to equal justice is an even greater interest where the State seeks to impose the penalty of death." *Jackson*, App. at A87. The Mississippi Supreme Court also found support in Justice Kennedy's *Giarrantano* concurrence. *Id.*

In concluding that the Constitution requires appointment of counsel in capital post-conviction proceedings, the Mississippi Supreme Court authoritatively dispelled the myth of self-representation:

> Over the years, it has become apparent that the system is flawed. Valuable time and resources are being wasted in finding representation for death-row inmates seeking post-conviction relief, especially since all remedies available under [state habeas] must be exhausted before federal habeas relief may be sought. We find at this time that recognition of the nature of death penalty litigation in the courts of this state, coupled with the ultimate penalty the State seeks to impose, requires . . . that counsel be appointed, and that reasonable expenses of litigation be allowed.

Id. at A82.

The Mississippi Attorney General did not seek review of the Mississippi Supreme Court's decision by this Court. Accordingly, the Court has not had an opportunity to address the split of authority caused by the Mississippi Supreme

Court's decision. This case provides a perfect vehicle to resolve this conflict.

Other courts have struggled with this issue, although the decisions of these courts were later reversed for a variety of reasons. For example, in *MacKall v. Murray*, the Fourth Circuit relied on the exception to *Finley* and *Giarrantano* suggested in *Coleman* to hold that state habeas petitioners have a constitutional right to effective assistance of counsel in state habeas trial court proceedings. 109 F.3d 957 (4th Cir. 1997), *vacated*, 131 F.3d 442 (4th Cir. 1997) (en banc). The court concluded:

> To decide that a defendant claiming ineffective trial counsel is not entitled to representation in his first habeas corpus proceeding, in a state that does not allow trial counsel's effectiveness to be challenged on direct appeal, would be to conclude that the defendant is not entitled in any forum to an attorney's assistance in presenting a fundamental constitutional claim. We will not so hold.

Id. at 962-963. Although the Fourth Circuit sitting en banc vacated the panel's opinion and reached a different conclusion, the panel's opinion underscores the struggle courts face in this unresolved area of the law.

III. IT IS IMPERATIVE THAT THE COURT CLARIFY THE STATE'S OBLIGATIONS TO THE POST-CONVICTION REVIEW PROCESS

This Court's cases on exhaustion and procedural default consistently emphasize the importance of state judgments in the post-conviction review of capital cases. *See, e.g.*, *Coleman*, 501 U.S. at 726, 729-31. The recent amendments to the habeas statute in the AEDPA reflect this shift toward increased reliance on the accuracy, validity, and finality of state post-conviction review. Similarly, Justice Kennedy observed in *Giarrantano* that this Court has given the states

"wide discretion" in deciding how to provide access to the courts for the poor. 492 U.S. at 14 (Kennedy, J., concurring).

With this increased deference and discretion comes important responsibilities. As recognized by the Mississippi Supreme Court in *Jackson*, states have an obligation to ensure that their judgments are worthy of the reliance placed on them by federal courts. And this, in turn, requires that the Court establish certain minimal standards of due process and equal protection necessary to warrant that reliance.

If Georgia is to impose the death penalty, then it must implement procedures to protect the integrity of its system by ensuring that death-row inmates have an opportunity to vindicate fundamental constitutional rights. States cannot, for example, postpone the appeal of important trial rights -- such as the right against self incrimination -- until habeas review, and then refuse to provide attorneys to vindicate those rights. Similarly, Georgia must provide death-row inmates with an opportunity to test the constitutionality of trial counsel's performance. Even if Georgia is not required to provide attorneys to capital habeas petitioners, it certainly cannot expedite capital cases where good-faith efforts to locate counsel are underway and thereby ensure that important constitutional claims will be forfeited.

To this end, the Court has a number of alternative remedies it can apply to this case. Each of these remedies ensures that mentally-limited death row inmates who do not have counsel to present fundamental constitutional claims will not be forced to forfeit those claims forever. At the one end of the spectrum of remedies, the Court could recognize that due process and equal protection mandate the appointment of counsel in capital habeas cases. Alternatively, the Court could conclude that if states chose not to provide counsel, due process and equal protection preclude them from expediting cases when good-faith efforts to secure volunteer counsel are underway. Finally, the Court could elect a narrow remedy by leaving the decision of whether due process and equal protection call for the

appointment of counsel to be answered in the first instance by the trial court on a case-by-case basis, subject of course to appellate review.

A. Due Process and Equal Protection Mandate The Appointment of Counsel

First, the Court could recognize that due process and equal protection mandate the appointment of counsel in capital habeas cases. Cases analyzing the right to counsel in various proceedings are tied to two, often interrelated, constitutional moorings: due process and equal protection.

Cases tied to the Due Process clause examine whether "fundamental fairness" requires the appointment of counsel. *E.g.*, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987). "'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals are treated." *Ross .v Moffitt*, 417 U.S. 600, 609 (1974). "[I]t is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question." *Finley*, 481 U.S. at 556; *see also Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981) ("[D]ue process is not a technical conception with a fixed content unrelated to time, place, and circumstances.") (quotation omitted).

Other lines of cases establish similar standards under the Equal Protection clause. While the focus of due process is the fairness between the State and the individual, equal protection "emphasizes the disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross*, 417 U.S. at 609. The equal protection analysis focuses more directly on whether the indigent defendant has had an appropriate opportunity to raise claims: "[W]here the merits of the one and only appeal an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Douglas*, 372 U.S. at 357.

The due process and equal protection cases with respect to the right to counsel eventually merge in substance. One clear principle emerges from both lines of cases: indigents must have an adequate opportunity to present their claims fairly within the adversary system. *E.g.*, *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985); *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). The inquiry in these cases is whether the indigent defendant has been provided the basic tools for an adequate presentation of the evidence. *See Ake*, 470 U.S. at 77.

In this case, Mr. Gibson was denied any opportunity to present his ineffective assistance claims fairly within the adversary process. In Georgia, ineffective assistance claims cannot be raised on direct appeal and must wait until the habeas trial court to be heard for the first time. If they are not raised and fully developed there, they likely can never be raised again. Mr. Gibson, confined to death row and borderline mentally retarded, was unable to formulate his claims, and therefore was denied the opportunity ever to raise them. He never had a lawyer investigate his case and marshal arguments on his behalf. If ever there was a "meaningless ritual" as condemned in *Douglas*, it was Exzavious Gibson standing alone before the Superior Court of Butts County, Georgia.

B. Due Process and Equal Protection Preclude States From Expediting Capital Cases Where Good-Faith Efforts To Secure Counsel Are Underway

Alternatively, the analysis can be focused even more narrowly on whether the Constitution permits a habeas trial court to expedite capital cases when good-faith efforts to locate volunteer counsel are underway. In this case, it was the Superior Court's decision to expedite the case that denied Mr. Gibson a full and fair opportunity, under the Due Process and Equal Protection principles discussed *supra*, to present his claims fairly within the adversary system.

Expediting cases where volunteer counsel has not, in good faith, been secured unjustifiably obstructs the

availability of professional representation, as condemned by the Court:

> The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights. This means that inmates must have a reasonable opportunity to seek and receive the assistance of attorneys. *Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right to the courts are invalid.*

Procunier v. Martinez, 416 U.S. 396, 419 (1974) (citing *Ex Parte Hull*, 312 U.S. 546 (1941)) (emphasis added).

By focussing on the constitutionality of expediting this case, the Court could avoid declaring a broad right to habeas counsel. At the same time, it could vindicate the principles of fair play and substantial justice that pervade its right to counsel cases.

C. The Determination of Whether Counsel Must Be Appointed Can Be Evaluated On A Case-By-Case Basis

Finally, the Court could elect a narrow remedy by leaving the decision of whether due process and equal protection call for the appointment of counsel to indigent death-row inmates to be answered in the first instance by the trial court. In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court examined whether the Constitution requires the appointment of counsel in every parental status termination proceeding. The Court concluded that a broad rule covering every case was inappropriate, and decided instead to "leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance

by the trial court, subject, of course, to appellate review." *Id.* at 32. In other words, the decision of whether counsel was required in these proceedings is to be determined on a case-by-case basis.

The Court in *Lassiter* set forth a balancing test with which to determine whether, in a particular case, counsel must be appointed. On one side of the balance is the "presumption against the right to appointed counsel" where the individual's physical liberty is not at stake.[12] *Id.* at 27, 31. Three factors are weighed against this presumption: 1) the private interests at stake; 2) the Government's interest; and 3) the risk that the procedures used will lead to erroneous results. *Id.*

On the facts of this particular case, application of *Lassiter*'s balancing test leads to the conclusion that the habeas trial court denied Mr. Gibson due process of law when it refused to appoint counsel for him or stay the proceedings until volunteer counsel could be secured. First, the presumption against the right to appointed counsel in a state habeas case raising substantial ineffective assistance claims is particularly weak because the right to effective assistance of counsel is a fundamental trial right that addresses the integrity of the entire trial process and the fairness of the result.

Second, the three factors weigh heavily in favor of the appointment of counsel in this case. The private interests at stake are unquestionably high. Mr. Gibson's life is at issue and his limited mental capacity makes it impossible for him to formulate and present, for example, his claim that trial counsel provided ineffective assistance in the penalty phase

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[12] This presumption does not preclude the broader constitutional principles discussed *supra*. The right to effective assistance of counsel is, in a very real sense, a trial right. The loss of this right results in the unconstitutional deprivation of physical liberty. However, because trial counsel is unable as a practical matter to raise ineffective assistance claims, the resolution of this right is simply postponed until habeas review.

of his trial by failing to proffer, *inter alia*, evidence of his diminished mental capacity. Further, Mr. Gibson has a strong interest in ensuring that the trial proceedings were fundamentally fair. The State has a strong interest in seeing that its death penalty statute is enforced fairly against criminals, and perhaps has an interest in expediting the process for pecuniary and public policy reasons. In addition, the State shares Mr. Gibson's interest in ensuring the ability of the adversary system to produce just results. Finally, the risk that the procedures in this case will lead to an erroneous result are insupportably high. In general, constitutional errors are found in nearly half of all capital habeas cases. In this case a lawyer was necessary to investigate all avenues of his trial lawyer's effectiveness and to prepare and present complex psychological testimony by expert witnesses -- a task that Mr. Gibson, with his diminished mental capacity, was clearly incapable of performing. Moreover, it was unreasonable for the trial court to refuse a brief continuance during Mr. Gibson's good-faith search for a lawyer.

Accordingly, to the extent a weak presumption against the appointment of counsel existed in the habeas proceedings below, Mr. Gibson can demonstrate that it is overwhelmed by the three-factored analysis of the interests at stake.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari in this case.

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Dated: July 8, 1999

Supreme Court, U.S.
FILED

99 77 JUL 8 - 1999

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

TONY G. TURPIN, WARDEN,
Georgia Diagnostic and Classification
Center,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of Georgia

Decided: February 22, 1999

S97R1412. GIBSON v. TURPIN, WARDEN.

HINES, Justice.

Exzavious Lee Gibson was convicted of armed robbery and malice murder in 1990, and was sentenced to death. This Court affirmed the judgments of conviction and sentences entered thereon on direct appeal, *Gibson v. State*, 261 Ga. 313 (404 SE2d 781) (1991), and the United States Supreme Court denied certiorari. *Gibson v. Georgia*, 502 U.S. 1101 (112 SC 1188, 117 LE2d 430) (1992). On December 20, 1995, Gibson filed a petition for writ of habeas corpus asserting ineffective assistance of counsel, prosecutorial misconduct, and other claims. The habeas corpus court denied Gibson's request for relief on March 11, 1997, and he filed an application for certificate of probable cause to appeal with this Court. Because there is no state or federal constitutional right to an appointed lawyer upon habeas corpus and because Gibson's remaining claims are without merit, we deny Gibson's application for certificate of probable cause to appeal.

The evidence supporting Gibson's convictions and death sentence is detailed in *Gibson*, 261 Ga. at 313-14 (1). Gibson entered a grocery store and killed the owner with a knife by stabbing and slashing him thirty-nine times. He attacked with such force that the blade of the knife broke in the victim's neck vertebrae, and still he continued stabbing with the handle and blade remnant. Acting on information

provided by a witness, the police arrested Gibson at his house. Bloody money, bloody clothes and the victim's wallet were found in Gibson's bedroom. Gibson confessed that he robbed and murdered the victim because he needed money for drugs, and because he had been in the store earlier on the day of the crimes and the victim had chastised him for using profanity. Gibson also told the police that he had no regrets about what he had done.

1. Gibson claims that he was denied his constitutional rights because he did not have state-funded counsel to represent him during his habeas corpus proceedings. Gibson's direct appeals were exhausted in 1992, when the United States Supreme Court denied his petition for certiorari and motion for rehearing. With the assistance of the Georgia Appellate and Educational Resource Center ("Resource Center"),[1] Gibson filed his petition for writ of habeas corpus on December 20, 1995. He was not facing a scheduled execution date when the petition was filed. Gibson and the Resource Center, who appeared as amicus curiae throughout his case, repeatedly moved for a continuance of the evidentiary hearing because the Resource

[1] The Resource Center was created in 1988 through the joint efforts of this Court, the State Bar of Georgia, the Georgia Attorney General, and the federal judiciary to provide expert assistance to attorneys who volunteer to represent indigent, death-row inmates in post-conviction proceedings. The Resource Center obtains volunteer counsel for death-sentenced inmates, and sometimes directly represents prisoners through its staff attorneys.

Center had not located volunteer counsel to represent him.[2] The Resource Center also repeatedly claimed that it lacked the staff to directly represent him. The motions for a continuance were denied.

At the habeas corpus evidentiary hearing in September 1996, a lawyer with the Resource Center, Elizabeth Wells, appeared as amicus curiae to protest the case going forward. The habeas court invited Ms. Wells to represent Gibson, but she refused. Ms. Wells stated that the Resource Center would represent Gibson as counsel of record, but only if the habeas court would reschedule the case so as to allow her time to review the record. The habeas court declined granting a continuance based on this conditional offer. After the evidentiary hearing, the habeas court issued a final order denying Gibson relief from his convictions and sentences. Gibson maintains that his constitutional rights were violated because the State of Georgia did not provide him with a state-funded attorney for his habeas corpus proceedings. We disagree.

It is well settled that there is no federal or state constitutional right to appointed counsel in Georgia habeas

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[2] In addition to assisting Gibson with the preparation and filing of his habeas corpus petition, the Resource Center filed the following motions in his case: Amicus Curiae Motion for Reconsideration of Scheduling Order (February 19, 1996), Amicus Curiae Motion for Reconsideration of Scheduling Order (March 25, 1996), Amicus Curiae Motion to Reconsider Scheduling Order (May 10, 1996), Amicus Curiae Motion for Hearing on Amicus Curiae Motion to Reconsider Scheduling Order (May 17, 1996), Amicus Curiae Motion for Ruling on Previously Filed Motions (August 16, 1996), Additional Amicus Curiae Motion to Reconsider Scheduling Order (August 16, 1996), Amicus Curiae Motion for Hearing on Additional Amicus Curiae Motion to Reconsider Scheduling Order (August 16, 1996), and Amicus Curiae Motion for Reconsideration of Final Order (March 20, 1997). The Resource Center also assisted Gibson in the preparation and filing of his Motion to Adopt Motions Filed by Amici Curiae.

corpus proceedings. *Coleman v. Thompson*, 501 U.S. 722, 755-58 (111 SC 2546, 115 LE2d 640) (1991)(capital case); *Murray v. Giarratano*, 492 U.S. 1, 11-12 (109 SC 2765, 106 LE2d 1) (1989) (capital case); *Pennsylvania v. Finley*, 481 U.S. 551, 555 (107 SC 1990, 95 LE2d 539) (1986); *State v. Davis*, 246 Ga. 200, 201-02 (269 SE2d 461) (1980) (capital case); *Stephens v. Balkcom*, 245 Ga. 492, 492-93 (3) (265 SE2d 596) (1980). Under the United States Constitution, the state is required to provide counsel to indigent defendants for their trial, *Gideon v. Wainwright*, 372 U.S. 335 (83 SC 792, 9 LE2d 799) (1963), and for their first appeal as a matter of right, *Douglas v. California*, 372 U.S. 353 (83 SC 814, 9 LE2d 811) (1963), but no further. The Constitution does not even require states with multi-tiered appellate systems to appoint appellate counsel through the exhaustion of an indigent defendant's discretionary direct appeals. *Ross v. Moffitt*, 417 U.S. 600 (94 SC 2437, 41 LE2d 341) (1974).

After his direct appeals are ended, a prisoner may seek a writ of habeas corpus alleging that his trial and direct appeals included substantial error under the federal or state constitutions. OCGA § 9-14-42 (a). However, habeas corpus is not a criminal proceeding, but is considered to be civil in nature. *Finley*, 481 U.S. at 557; *Nolley v. Caldwell*, 229 Ga. 441, 441 (4) (192 SE2d 151) (1972). It is a collateral attack that is separate and distinct from direct review, and occurs only after a prisoner has failed to obtain relief by direct appeal. Id. It is not an extension of direct appeal:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have otherwise become final.
> It is not designed as a substitute for direct review.

Mackey v. United States, 401 U.S. 667, 682-83 (91 SC 1160, 28 LE2d 404) (1971) (Harlan, J., concurring in part and dissenting in part)(emphasis in original). Habeas corpus is

not intended to be a means for re-litigating a prisoner's case. See *Gunter v. Hickman*, 256 Ga. 315, 316 (1) (348 SE2d 644) (1986) (issues raised and decided on direct appeal cannot be reasserted in habeas corpus proceedings); *Black v. Hardin*, 255 Ga. 239, 240 (4) (336 SE2d 754) (1985) (failure to raise an alleged error on direct appeal will ordinarily preclude habeas corpus review). No state is obligated under the United States Constitution to provide habeas corpus proceedings as a means of obtaining post-conviction relief. *Finley*, 481 U.S. at 557. Habeas corpus review is not a second trial.

Exzavious Lee Gibson was arrested nine years ago for murder. Because he was indigent, the trial court appointed a lawyer who was experienced in death penalty litigation to defend him at the state's expense. Gibson's lawyer investigated and tried the case. A jury of Gibson's peers, after receiving the overwhelming evidence of his guilt and the brutality of the murder, convicted him and sentenced him to death. Gibson's appointed, state-funded lawyer appealed, raising numerous enumerations of error. This Court, finding no harmful error with Gibson's trial, unanimously affirmed his convictions and sentences. *Gibson*, 261 Ga. at 317. The entire process, trial and direct appeal, was governed by the Unified Appeal Procedure ("UAP"), OCGA § 17-10-36, which utilizes a checklist to ensure that "all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements." OCGA § 17-10-36 (b); UAP § I (A). An appointed lawyer represented Gibson at every stage of his criminal defense.

After his direct appeals were exhausted, Gibson exercised his right under the Georgia constitution to petition for writ of habeas corpus. However, he asserts that this is an empty right because the lack of a state-funded lawyer prevents him from adequately raising his claims. This Court

has previously addressed whether the lack of appointed counsel denies an indigent death-row petitioner meaningful access to the courts under *Bounds v. Smith*, 430 U.S. 817 (97 SC 1491, 52 LE2d 72) (1977), and has held that it does not. *Davis*, 246 Ga. at 201. In *Davis*, this Court further held that there is no exception for death-row inmates based upon the irrevocability of death, reasoning that, if meaningful access to the courts meant appointed counsel, all habeas corpus petitioners would be entitled to appointed counsel. Id.

The dissent seeks to stretch the right of meaningful access to the courts beyond its constitutional bounds. Meaningful access means that state authorities must ensure that inmates have "'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Lewis v. Casey*, 116 SC 2174, 2180 (1996), quoting *Bounds*, 430 U.S. at 825. For example, a state may not interfere with an inmate's attempt to prepare or file legal documents, and a state must waive filing fees for indigent inmates. *Lewis*, 116 SC at 2179. Meaningful access does not mean that a state must help inmates discover grievances, or litigate effectively when in court. *Lewis*, 116 SC at 2181. It is simply the right of an inmate to raise his claims and be heard.

Gibson does not allege that Georgia did anything to prevent him from raising his claims. Instead, he asserts that Georgia should have financed his habeas corpus litigation by providing him with a lawyer at state expense. In other words, he raised his claims, but not as effectively as he would have preferred. Gibson, however, has cited no cases that entitle him to a lawyer in order to have meaningful access to the courts. While the United States Supreme Court has provided some examples of what resources provided to inmates may constitute meaningful access to the courts upon habeas corpus, such as adequate law libraries, *Bounds*, 430 U.S. at 830, it has never held that an appointed attorney is required. Indeed, the Supreme Court has specifically

disclaimed the idea that the Constitution requires the permanent provision of counsel so that inmates can litigate more effectively. *Lewis*, 116 SC at 2181.

The apparent rationale underlying Gibson's claim of lack of meaningful access to the courts is that he is not intelligent and habeas corpus law is complex ("Byzantine"). This rationale, however, does not distinguish him from the many non-capital habeas petitioners. Numerous prisoners have limited intellect and education, and many issues that arise in non-capital cases are complicated. The test for ineffective assistance of counsel outlined in *Strickland v. Washington*, 466 U.S. 668 (104 SC 2052, 80 LE2d 674) (1984), and *Smith v. Francis*, 253 Ga. 782 (325 SE2d 362) (1985), and the required showings necessary to prevail on this claim, are the same for non-capital cases as capital cases. If an appointed lawyer is truly *constitutionally* required in order to ensure meaningful access to the courts upon habeas corpus, courts would be hard-pressed to justify why only death-row inmates, and not all inmates, should have this *constitutional* right. "Death is different" is the only reason that this line could be drawn.

The "death is different" reason is often used to justify additional procedures and closer scrutiny in death penalty cases. The phrase is correct: death *is* different. Death penalty cases *do* require closer examination and the additional safeguards provided by law.[3] The citizens of this

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[3] For this reason, the Georgia death penalty statute is crafted to narrow the class of murderers who may receive the death penalty to the most culpable. OCGA § 17-10-30; *Gregg v. Georgia*, 428 U.S. 153, 196-97 (96 SC 2909, 49 LE2d 859) (1976). A convicted murderer can only receive a death sentence if the prosecution proves the existence of at least one statutory aggravating circumstance beyond a reasonable doubt. OCGA § 17-10-30 (c); *Gregg*, 428 U.S. at 197. In order to convince a jury that life imprisonment is the appropriate sentence, a capital defendant is permitted to introduce anything as mitigating evidence as long as it relates to his offense, background or character. *Barnes v. State*,

state should be, must be, appalled at the prospect of executing an innocent person, or a murderer undeserving of the ultimate punishment. But anyone familiar with the facts that underlie this petitioner's convictions and sentences, of what he did to a shopkeeper on February 2, 1990, knows that Exzavious Lee Gibson is neither innocent nor undeserving of the death penalty. "Death is different" is a crucial reminder of the gravity of a sentence where the state seeks to punish a defendant by taking his life, and of the need for procedural safeguards in the determination and carrying out of such a sentence, but it should not be used to construct constitutional rights that do not exist, or to usurp the legislature's role in determining the structure of our criminal justice system and the allocation of legal resources. Neither the federal nor Georgia constitutions require the appointment of a lawyer for a death-row inmate to have meaningful access to the courts upon habeas corpus. *Giarratano*, 492 U.S. at 11-12; *Davis*, 246 Ga. at 201.

The lack of appointed counsel upon state habeas corpus is also not "fundamentally unfair." Obviously, an attorney could better investigate, structure, and present Gibson's habeas claims than Gibson could. But this simple fact does not support an equal protection claim:

> The duty of the State under our cases is not to duplicate the legal arsenal that may be

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269 Ga. 345, 358-60 (27) (496 SE2d 674) (1998). A Georgia sentencing jury is also not instructed to weigh mitigating circumstances, and may return a life sentence for any reason or no reason at all. *Barnes*, 269 Ga. at 359 (27). If a defendant is mentally retarded, the death sentence may not be imposed in this state. OCGA § 17-7-131 (j). On appeal, this Court, in addition to reviewing for error, determines whether the death sentence is proportional to other death penalty cases when considering both the crime and the defendant, and whether the death sentence was imposed under the influence of impermissible passion, prejudice, or any other arbitrary factor. OCGA § 17-10-35 (c) (1) and (3); *Gregg*, 428 U.S. at 204-06.

> privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Finley, 481 U.S. at 556, quoting *Ross*, 417 U.S. at 616. Nor does it support a due process claim because the existence of habeas corpus "'does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way.'" *Finley*, 481 U.S. at 556, quoting *Ross*, 417 U.S. at 610-611.

Gibson further argues that he has a constitutional right to a state-funded lawyer upon habeas corpus because, as he had the same lawyer at trial and on direct appeal, it is his first opportunity to raise a Sixth Amendment claim of ineffective assistance of counsel. This argument, which the dissent asserts was left an "open question" by *Coleman*, 501 U.S. at 755-56, has since been rejected by every federal court of appeals that has considered it. *Mackall v. Angelone*, 131 F3d 442, 449, n. 13 (4th Cir. 1997); *Parkhurst v. Shillinger*, 128 F3d 1366, 1371 (10th Cir. 1997); *Hill v. Jones*, 81 F3d 1015, 1024-26 (11th Cir. 1996); *Bonin v. Calderon*, 77 F3d 1155, 1159-60 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F2d 615, 616-17 (8th Cir. 1992). Two additional reasons for not creating this constitutional right bear consideration. First, as with meaningful access, if a constitutional right to habeas counsel exists for this reason it would apply to almost all habeas corpus petitioners, and not just to death-row inmates. Second, a constitutional right to habeas counsel, carried to its logical conclusion, would spawn more litigation and delay in an already cumbersome system. This Court and the United States Supreme Court have long held that the constitutional right to counsel is the right to effective counsel. *Strickland*, 466 U.S. at 686; *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (90 SC 1441, 25 LE2d 763) (1970); *Black v. State*, 264

Ga. 550, 550 (1) (448 SE2d 357) (1994); *Pitts v. Glass*, 231 Ga. 638, 639 (203 SE2d 515) (1974). Presumably, if there is a constitutional right to counsel upon state habeas corpus, an additional Sixth Amendment claim will exist in Georgia: ineffective assistance of habeas counsel. See *Wainwright v. Torna*, 455 U.S. 586, 587-88 (102 SC 1300, 71 LE2d 475) (1982) (a defendant can only be deprived of his Sixth Amendment right to effective assistance of counsel where there is a constitutional right to counsel).[4] Also, if the same reasoning applies, a petitioner who raises this new claim must have appointed counsel to do so, because it is his first opportunity to raise this constitutional claim with regard to his habeas counsel. There will be collateral proceedings to consider alleged Sixth Amendment error in previous collateral proceedings. See *Bejarano*, 929 P2d at 925 (if ineffective assistance of post-conviction counsel is a viable claim then "claims of ineffective assistance of counsel in the immediate prior proceeding may be raised ad infinitum").

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[4] Jurisdictions that provide a *statutory* right to post-conviction counsel have addressed a claim of ineffective assistance of post-conviction counsel in different ways. Some reason that such a claim is not viable because there is no constitutional right to post-conviction counsel, see *House v. State*, 911 SW2d 705, 712 (Tenn. 1995) (despite statute providing for appointed post-conviction counsel, there is no cognizable claim of ineffective assistance of post-conviction counsel); or that, when statutory appointment of counsel is discretionary, there is no right to effective post-conviction counsel, see *Bejarano v. Warden*, 929 P2d 922, 925 (Nev. 1996) (since petitioner is not statutorily entitled to post-conviction counsel, there is no viable claim of ineffective assistance of post-conviction counsel); or that there is a full statutory right to effective assistance of post-conviction counsel, see *Lozada v. Warden*, 613 A2d 818, 821-24 (Conn. 1992) (claim of ineffective assistance of post-conviction counsel is a viable claim because statute requires the appointment of post-conviction counsel). We note that federal law specifically prohibits a claim of ineffective assistance of state or federal habeas corpus counsel as a ground for a state prisoner obtaining federal habeas corpus relief. 28 U.S.C. § 2254 (i).

In determining what is constitutionally required, a relevant inquiry is also what is the contemporary practice. As part of his claim of lack of fundamental fairness, Gibson asserts that Georgia is one of only two states that does not permit appointed counsel for indigent death-sentenced habeas corpus petitioners. However, closer examination reveals that no state, save for Mississippi, has recognized a *constitutional* right to appointed counsel upon habeas corpus. See *Jackson v. State*, No. 98-DR-00708-SCT, 1999 WL 33904 (Miss. Jan. 28, 1999). Almost every jurisdiction that provides state-funded counsel to indigent death-row habeas corpus petitioners does so by statute. See Ala. Code § 15-12-23 (a) (1995) (subject to judicial discretion); Ariz. Rev. Stat. Ann. §§ 13-4041 (B), 4234 (D) (West Supp.1998); Ark. Code Ann. § 16-91-202 (a) (1) (Michie Supp.1997); Cal. Gov't Code § 68662 (West Supp. 1999); Colo. Rev. Stat. § 21-1-104 (1997); Conn. Gen. Stat. § 51-296 (a) (1998); Fla. Stat. Ann. § 27.702 (West Supp. 1999); Idaho Code § 19-4904 (Michie 1997) (subject to judicial discretion); 725 Ill. Comp. Stat. Ann. § 5/122-2.1 (a) (1) (West 1992); Ind. Code Ann. § 33-1-7-2 (a) (Lexis 1998); Kan. Stat. Ann. § 22-4506 (1995) (subject to judicial discretion); Ky. Rev. Stat. Ann. § 31.110 (2) (c) (Banks-Baldwin 1991); La. Code Crim. Proc. Ann. art. 930.7 (West 1997) (subject to judicial discretion); Md. Ann. Code art. 27, § 645A (f) (1) (1998); Mo. Ann. Stat. § 600.042 (West Supp. 1999); Mont. Code Ann. § 46-21-201 (1997); Neb. Rev. Stat. Ann. § 29-3004 (Michie 1995) (subject to judicial discretion); Nev. Rev. Stat. Ann. § 34.750 (1) (Michie 1996) (subject to judicial discretion); N.J. Stat. Ann. § 2A:158A-5 (West Supp. 1998); N.Y. Jud. Law § 35-b (McKinney Supp. 1999); N.C. Gen. Stat. § 7A-451 (a) (2) (1995); Ohio Rev. Code Ann. §§ 120.06, 120.16, 120.26 (Anderson 1998) (subject to public defender discretion); Okla. Stat. Ann. tit. 22 § 1355.6 (B) (West Supp. 1999); Or. Rev. Stat. § 138.590 (3) (1990); S.C. Code Ann. § 17-27-160 (B) (West Supp. 1998); S.D. Codified Laws § 21-27-4 (Michie 1987); Tenn. Code Ann. § 40-30-306 (a) (1997); Tex. Crim. P. Code Ann. § 11.071 (West Supp. 1999); Utah

Code Ann. § 78-35a-202 (1998); Va. Code Ann. § 19.2-163.7 (Michie 1995); Wash. Rev. Code Ann. § 10.73.150 (West Supp. 1998); see also 21 U.S.C. § 848 (q) (4) (B) (right to qualified legal representation for capital petitioners in federal habeas corpus proceedings).[5] The contemporary practice thus illustrates that a law providing appointed counsel to indigent death-row habeas petitioners usually results from legislative enactment, not judicial fiat.

Gibson claims that Georgia is constitutionally required to provide counsel in death penalty habeas corpus proceedings in order to ensure the fundamental fairness of Georgia's death penalty procedures and meaningful access to the courts. This assertion, which ignores the collateral purpose of habeas corpus, would lead to the judicial creation of a right not found in the federal or state constitutions, or resulting from the exercise of the legislative process. We do not say that a law providing state-funded counsel to indigent death-row habeas petitioners lacks merit. In fact, such a law might be good policy. "But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators." *Gregg*, 428 U.S. at 174-75. A law requiring appointed counsel for capital habeas petitioners is not constitutionally compelled, and therefore, the decision to create such a law rightfully belongs to the General Assembly.

2. Gibson alleges that his trial counsel was ineffective due to numerous errors and omissions, including failure to object to preserve error at trial, failure to make important pretrial motions, and failure to adequately

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[5] We note that some of these statutes were recently enacted so that the states could opt-in to Chapter 154 of the federal Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 18 U.S.C. §§ 2254 and 2261-66. See, e.g., Ark. Code Ann. § 16-91-204 (1997) (legislative intent of statute requiring appointed counsel in capital post-conviction proceedings is to obtain expedited federal review under the AEDPA).

investigate and present key mitigation evidence. Gibson's trial counsel testified at the habeas corpus evidentiary hearing and we have examined the record from that hearing and the record of Gibson's trial and direct appeal.

In order to prevail on a claim of ineffective assistance of counsel, Gibson must show that his trial counsel's performance was deficient and that this deficient performance actually prejudiced his defense. *Strickland*, 466 U.S. at 687; *Smith*, 253 Ga. at 783 (1). Under this standard, Gibson's trial counsel is afforded a strong presumption that his performance fell within a wide range of reasonable professional conduct. *Smith*, supra. To show actual prejudice, Gibson must demonstrate that, but for trial counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. Id.

Based on the record, we are able to determine the following: Gibson's counsel, William Dennis Mullis, was appointed to defend Gibson shortly after his arrest. Mr. Mullis was the contract public defender for the judicial circuit, and had previously defended two death penalty cases. Mullis met with Gibson many times before trial and found him to be rational and cooperative. Gibson was able to assist Mullis by providing the names of potential mitigation witnesses.

The evidence of Gibson's guilt was overwhelming. A witness saw and recognized Gibson running from the grocery store immediately after the killing. A police officer, acting on this information, went to Gibson's house only fifteen minutes after the murder, and was invited inside by Gibson's grandmother. The police officer followed a trail of fresh blood droplets back to Gibson's bedroom where he discovered bloody money, bloody clothes and the victim's wallet. Gibson was found hiding in a closet. His shoes were consistent with bloody shoe prints found in the grocery store.

Gibson gave two statements, one written and one videotaped. In both statements he confessed to the murder and armed robbery.

Mullis investigated Gibson's case. He examined the entire state's file because the district attorney had an open file policy. He interviewed several law enforcement witnesses and the woman who had seen and recognized Gibson leaving the grocery store after the murder. He called the doctor who conducted the autopsy. Mullis filed several discovery motions, including a *Brady* motion, and he attempted to subpoena employees of the state crime lab to produce their testing materials. In addition to a court-ordered psychological evaluation to determine competency, Mullis successfully moved for an independent psychological evaluation.

Mullis filed additional pretrial motions. He moved to suppress the items discovered in Gibson's bedroom, claiming an illegal warrantless search. He moved to suppress Gibson's statements, claiming that Gibson had been under the influence of narcotics when he waived his *Miranda* rights. Mullis also moved for a change of venue because there had been several articles in local newspapers that he believed to be inflammatory. The trial court reserved ruling on the change of venue request until the completion of voir dire, and then denied it due to the few jurors biased by pretrial publicity. The trial court granted a motion requesting the completion of a pretrial juror questionnaire.

The psychologist who performed the court-ordered evaluation was Dr. Robert J. Storms. Dr. Storms determined that Gibson was competent to stand trial and was not insane at the time of the murder. Mullis contacted Dr. Storms regarding possible mitigation issues and Dr. Storms informed him that Gibson's IQ was in the 80s, and that he was not mentally retarded. Dr. Storms also told Mullis that he had not uncovered any past history of child abuse, and

that Gibson had been in considerable trouble with the law, leading to stays in various youth detention institutions. Dr. Storms stated that Gibson "had not had a particularly wonderful upbringing" and "it seems like he essentially raised himself."

Another psychologist, Dr. George T. Anderson, performed the independent examination of Gibson. He reported to Mullis that Gibson had a tested IQ of 76, which is borderline intelligence, but that Gibson was "certainly not retarded." Dr. Anderson stated that Gibson's IQ was probably five or six points higher than he tested because Gibson had not tried very hard on the test -- he "didn't act like he cared one way or the other." Dr. Anderson also reported that Gibson's mother died when he was two years old, that his father had not been involved in his life, and that he was raised by an aunt in Maryland. Gibson abused alcohol and drugs, and had spent some time in a juvenile facility and a Florida jail for a variety of offenses. Gibson has no brothers or sisters.

Mullis contacted Gibson's family members about possible mitigation evidence. The aunt who raised Gibson, Faustine Christopher, agreed to testify. Mullis also spoke with another aunt and Gibson's grandmother. Gibson told Mullis that Christopher had used corporal punishment on him, but no relatives corroborated any history of childhood abuse. Although Gibson's grandmother lived in Dodge County, she did not testify because she "didn't want to get involved" and Mullis believed that she could not offer much favorable evidence. Mullis did locate an acquaintance in Dodge County who agreed to testify about Gibson's peaceful nature (Gibson had only lived in Dodge County about two months before the murder).

Despite the overwhelming evidence of Gibson's guilt, Mullis did not believe anything would be gained by pleading guilty and going to trial only on sentencing. At

trial, Mullis successfully moved to prevent the jury from seeing the video portion of Gibson's confession because it depicted Gibson wearing handcuffs,[6] and he was successful in keeping out cumulative photographs of the victim's body. Mullis was also concerned about the autopsy report, which indicated that the victim had been paralyzed from the neck down by the stab wound that broke the knife blade. He believed that this would be very damaging aggravation evidence because the jury would hear that Gibson had continued to assault a helpless victim. After the autopsist testified that the neck wound had left the victim as helpless as a "rag doll" and that Gibson had continued to stab with the remnant of the knife, Mullis managed to impeach the autopsist with a statement he made to Mullis during their pretrial telephone conversation. The doctor conceded that the neck wound that resulted in the broken blade could have been the final wound.

During the sentencing phase, the state introduced evidence of an escape attempt by Gibson. Three months before trial, Gibson escaped from his cell at the city jail and was caught inside the building. The police discovered a letter addressed "To the Police" on Gibson's bunk when they first noticed he was missing. Gibson's letter described his "magnificent escape" in a mocking, condescending tone. The letter and police testimony about the escape were introduced over defense objection. To counter this evidence, Mullis used Gibson's testimony in the sentencing phase to explain that this event was not actually an escape but an attempt to get transferred from the city jail to the county jail, which Gibson believed to be more comfortable. Regarding the letter, Mullis testified at the habeas corpus hearing that he had warned Gibson, as he does all his clients, not to write

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[6] Mullis believed that it was important to prevent the jury from seeing the video because of Gibson's remorseless demeanor during his confession. The jury was permitted to hear the confession.

anything in jail that could be used by the state, but Gibson had ignored him.

Mullis testified that his mitigation strategy was "two-pronged." He planned to focus on Gibson's youth (seventeen years old at the time of the murder) and his lack of a home life while growing up. Gibson's aunt, Faustine Christopher, testified that Gibson's father had left his mother when Gibson was only a few months old, and that his parents had never been married. When Gibson was only two years old, his mother was murdered. Ms. Christopher further testified that she raised Gibson, who was a playful child until he began to get into trouble when he was fourteen years old. Another witness, Sharon Jordan, testified that she had known him during the short time he had lived in Dodge County and that he had a peaceful nature. Then Gibson testified, expressing remorse and explaining that he had been high on drugs when he killed the victim. He also testified that he was only seventeen years old when he committed the murder. In his closing argument, Mullis invoked Gibson's youth and his lack of a family while growing up. He implored the jury to spare Gibson, saying to do so would be Christian. The jury returned a recommendation of death.

Mullis's representation of Gibson was not deficient. See *Strickland*, 466 U.S. at 687. Mullis investigated Gibson's possible defenses, interviewed key witnesses, and discovered that Gibson was competent and not mentally retarded. Mullis therefore elected to present evidence in the sentencing phase of Gibson's youth, his remorse, and his childhood without parents. We cannot conclude that this decision was not made in the exercise of reasonable professional judgment. Id. at 690; *Smith*, 253 Ga. at 783 (1). In addition, the record reveals that Mullis filed numerous relevant pretrial motions and made timely objections at trial. Mullis's conduct fell within the wide range of reasonable professional conduct permitted in *Strickland*. Id.

Furthermore, even if we were to assume that Gibson's counsel was deficient, Gibson cannot show actual prejudice. *Strickland*, 466 U.S. at 694; *Smith*, supra. The murder was extremely brutal; the victim was savaged with dozens of stab and slash wounds. The attack was so violent the victim's spinal cord was severed and knife blows to the head resulted in superficial skull fractures. In his recorded statement, Gibson told the police that he had entered the store and begun stabbing the victim without saying anything or giving the victim a chance to turn over the money without a fight. He said that he had no regrets about what he had done. Gibson's escape attempt, in conjunction with his mocking letter to the police, also showed that he was a difficult prisoner and an escape risk. In addition, two psychological examinations revealed that Gibson was not mentally ill or retarded. Under these circumstances, Gibson cannot demonstrate that there was a reasonable probability that, assuming his lawyer's representation was deficient, the outcome of his trial would have been different. Id. The habeas court did not err by denying Gibson's claim of ineffective assistance of trial counsel.

3. Gibson asserts that the habeas court erred by scheduling his case to conform with the time limits established by Uniform Superior Court Rule 44 for the litigation of a capital habeas corpus case. This claim is without merit. *Davis v. Thomas*, 266 Ga. 835, 838 (471 SE2d 202) (1996) (habeas court has broad discretion in controlling its calendar).

4. The habeas court's adoption of a final order drafted by the state was not error. *Jefferson v. Zant*, 263 Ga. 316, 316-17 (1) (431 SE2d 110) (1993).

5. Gibson's remaining habeas claims are procedurally defaulted because they could have been raised on direct appeal and were not. *Black*, 255 Ga. at 240 (4); OCGA § 9-14-48 (d). These claims include allegedly

prejudicial remarks made by the state in its closing argument, the state's alleged failure to disclose exculpatory evidence, and the constitutionality of the Unified Appeal Procedure.

Application for certificate of probable cause to appeal denied. All the Justices concur, except Benham, C.J., Fletcher, P.J., and Sears, J., who dissent.

S97R1412. GIBSON v. TURPIN, WARDEN.

FLETCHER, Presiding Justice, dissenting.

I dissent because the state and federal constitutions require appointment of counsel for a death penalty inmate who is pursuing his first habeas corpus petition and who is seeking to challenge his conviction and sentence on a basis not available on direct appeal.[1] Counsel for this habeas petitioner is required in order to protect the constitutional guarantee of meaningful access to the courts because of the complexity of habeas corpus law and the importance of habeas review in ensuring fundamental fairness in capital cases.

The same counsel represented Gibson at trial and on direct appeal. This habeas petition is therefore Gibson's first opportunity to challenge his conviction and sentence on the ground of ineffective assistance of counsel.[2] The habeas court denied the motion of amicus for a continuance for obtaining pro bono counsel and conducted an evidentiary hearing over Gibson's objection that he had no attorney. The record shows that Gibson has an eighth grade education and

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[1] Although the posture of this case is a request for a certificate of probable cause to appeal, the issue of Gibson's right to counsel has been fully briefed by both sides and the record of the habeas court is before us. Additionally, the Court has the benefit of amicus briefs.

[2] Castell v. Kemp, 254 Ga. 556, 558 (331 SE2d 528, 530) (1985).

is in the "borderline range of intelligence" with an IQ between 76 and 82. Following the hearing, the court made an ex parte request of the state to prepare an order, which the court then adopted verbatim.

The Georgia Constitution guarantees the right to seek habeas corpus relief.[3] The right to seek habeas review includes the right to meaningful access to the courts to pursue the habeas challenge.[4] As this Court recently stated, "[p]risoner access to the courts in order to challenge unlawful convictions . . . cannot be unjustifiably denied or obstructed."[5] The federal constitution provides similar protections.[6] The question becomes whether meaningful access and fundamental fairness require appointment of counsel in a capital post-conviction proceeding that provides the first opportunity to raise a constitutional challenge to the conviction and sentence. This is a question that the United States Supreme Court has never addressed and has specifically left open.[7]

The majority's reliance on Murray v. Giarratano[8] and State v. Davis[9] is unpersuasive because neither case involved

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[3] Ga. Const. Art. I, §. I, Par. XV.

[4] See Howard v. Sharpe, 266 Ga. 771, 772 (470 SE2d 678) (1996); Giles v. Ford, 258 Ga. 245 (368 SE2d 318) (1988); Johnson v. Caldwell, 229 Ga. 548, 550 (192 SE2d 900) (1972).

[5] Howard v. Sharpe, 266 Ga. 771, 772 (470 SE2d 678) (1996).

[6] Lewis v. Casey, 116 SC 2174, 2182 (1996) (state must provide "tools . . . inmates need in order to attack their sentences, directly or collaterally"); Bounds v. Smith, 430 U.S. 817, 821-823 (97 SC 1491) (1977) (prisoners have constitutional right to meaningful access to the courts).

[7] See Coleman v. Thompson, 501 U.S. 722, 755 (111 SC 2546, 115 LE2d 640) (1991).

[8] 492 U.S. 1 (109 SC 2765, 106 LE2d 1) (1989).

a death penalty inmate who was forced to proceed at his first habeas proceeding without counsel. Giarratano was not a habeas proceeding, but was a civil rights case seeking broad prospective relief. As Justice Kennedy observed in casting the deciding vote in Giarratano, Virginia already provided institutional lawyers to assist in preparing postconviction petitions and "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post conviction proceedings."[10] Similarly, Davis was never without counsel; he was simply without compensated counsel.[11] In Davis, this Court held only that the trial court erred in "appointing" the Prisoner Legal Counseling Project, and thus providing for payment.[12] The Court noted that lawyers with the PLCP were already providing legal advice and representation on a volunteer basis.[13] The first factor to consider in addressing the question of whether the constitution requires appointed counsel is the nature of the proceedings. The United States Supreme Court has recognized that an attorney's assistance in capital post-conviction proceedings is "crucial because of the complexity of . . . jurisprudence in this area."[14] As Justice Kennedy

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[9] 246 Ga. 200 (269 SE2d 461) (1980).

[10] Giarratano, 109 SC at 2773 (Kennedy, J., concurring).

[11] Davis' pro bono counsel continued to represent him through a second reversal in federal habeas proceedings and finally a guilty plea in exchange for a life without parole sentence. See Davis v. Kemp, 752 F.2d 1515 (11th Cir. 1985); Davis v. State, 261 Ga. 221, 222 (403 SE2d 800) (1991); Metro and State in Brief, ATLANTA CONST., May 29, 1993 at B2.

[12] 246 Ga. at 201.

[13] Id.

[14] McFarland v. Scott, 512 U.S. 849, 855 (114 SC 2568, 129 LE2d 666) (1994).

observed in Giarratano, post-conviction proceedings are a "central part of the review process for prisoners sentenced to death."[15] Troubling statistics confirm this: nearly half (46%) of all capital cases reviewed in federal habeas proceedings between 1976 and 1991 were found to have constitutional error.[16] In 1996, this Court also recognized the importance of counsel when Chief Justice Benham sent letters to approximately 80 law firms across this state requesting that each firm agree to represent an individual in a capital post-conviction case on a pro bono basis. As this case demonstrates, however, reliance on pro bono counsel is no longer adequate. Recently, the Supreme Court of Mississippi recognized that such reliance is insufficient and granted a motion for appointed and compensated counsel for a death row inmate in state post-conviction proceedings.[17] That court recognized that the uniqueness of death as a sentence and the complexity of post-conviction procedures require counsel in order to provide meaningful access to the courts.[18]

The need for counsel is even greater with the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, 2262-66, Georgia's Death Penalty Habeas Corpus Reform Act of 1995 OCGA § 9-14-44, et seq., and Uniform Superior Court Rule 44. Together these enactments impose strict time limitations on habeas petitions in death penalty cases. A prisoner sentenced to die must file his or her federal habeas petition within one year of the

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[15] 492 U.S. at 14 (Kennedy, J. concurring).

[16] McFarland v. Scott, 512 U.S. 1256,1263 (114 SC 2785, 129 LE2d 896) (1994) (mem.) (Blackmun, J., dissenting).

[17] Jackson v. State, No. 98-DP-00708-SCT, 1998 WL 469953 (Miss. Jan. 28, 1999).

[18] Id.

conviction becoming final, with tolling allowed if state post-conviction proceedings are pending.[19] In Georgia, Rule 44 requires that a habeas petitioner file all pretrial motions within 60 days of filing a petition and complete discovery within 120 days. Rule 44 also requires the evidentiary hearing to be conducted within 180 days of the filing of the petition. Failure to meet these requirements will result in the absence of any hearing on the merits for the habeas petitioner. Furthermore, as the State Bar of Georgia points out in its amicus brief, the strict time limits of this rule actually discourage lawyers from accepting the Chief Justice's plea for pro bono assistance because the rules do not permit adequate time to become familiar with the Byzantine requirements of habeas corpus law.

It is also important to consider the claims being raised in the habeas petition. In this case, Gibson is seeking to challenge the effectiveness of his trial counsel, an issue that he has not been able to assert previously. It is well-established that indigent defendants are entitled to counsel for the direct appeal from the judgment of conviction and sentence.[20] A state that permits a defendant to raise a constitutional challenge to his death sentence only after the right to counsel has expired is treading heavily on the Sixth Amendment right to counsel, especially in light of the unusual importance of post-conviction proceedings in capital cases. Repeated reversals of convictions and death sentences in habeas proceedings demonstrate that the protections given in the trial and direct appeal stages of death penalty cases are often not sufficient to assure their reliability.[21] The fact that

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[19] 28 U.S.C. § 2244(d)(1).

[20] Douglas v. California, 372 U.S. 353, 358 (83 SC 814, 9 LE2d 811) (1963).

[21] See e.g., Roberts v. State, 263 Ga. 764 (438 SE2d 905) (1994) (referring to unpublished habeas decision reversing conviction and sentence); Nelson v. Zant, 261 Ga. 358 (405 SE2d 250) (1991); Ross v.

death sentences are not reimposed following a successful habeas petition underscores the importance of the habeas proceeding.[22] Furthermore, the United States Supreme Court

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Kemp, 260 Ga. 312 (393 SE2d 244) (1990) (per curiam); Birt v. State, 259 Ga. 800 (387 SE2d 879) (1990) (referring to unpublished habeas decision vacating death sentence); Curry v. Zant, 258 Ga. 527 (371 SE2d 647) (1988); Hardy v. State, 258 Ga. 523 (371 SE2d 849) (1988) (referring to unpublished habeas decision vacating death sentence); Floyd v. Stynchcombe, 252 Ga. 113 (311 SE2d 828) (1984); Zant v. Hamilton, 251 Ga. 553 (307 SE2d 667) (1983); Jarrell v. Kemp, 248 Ga. 492 (284 SE2d 17) (1981); Zant v. Gaddis, 247 Ga. 717 (279 SE2d 219) (1981); Amadeo v. Zant, 486 U.S. 214 (108 SC 1771, 100 LE2d 249) (1989); Dobbs v. Turpin, 142 F.3d 1383 (1998); Hill v. Turpin, 135 F.3d 1411 (11th Cir. 1998); Baxter v. Thomas, 45 F.3d 1501 (1995); Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994); Burden v. Zant, 24 F.3d 1298 (11th Cir. 1994); Moore v. Zant, 972 F.2d 318 (11th Cir. 1992); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988); Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988); Corn v. Kemp, 837 F.2d 1474 (11th Cir. 1988); Godfrey v. Kemp, 836 F.2d 1557 (11th Cir. 1988); Dick v. Kemp, 833 F.2d 1448 (11th Cir. 1987); Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987) (en banc) (reversing convictions of Charles Bowen and Horace William Dix); Brooks v. Kemp, 809 F.2d 700 (11th Cir. 1987); Thomas v. Kemp, 800 F.2d 1024 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Ruffin v. Kemp, 767 F.2d 748 (11th Cir. 1985); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (en banc); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Wallace v. Kemp, 757 F.2d 1102 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Morgan v. Zant, 743 F.2d 775 (11th Cir. 1984); Strickland v Francis, 738 F.2d 1542 (11th Cir. 1984); Goodwin v Balkcom, 684 F.2d 794 (11th Cir. 1982); Young v. Kemp, 677 F.2d 792 (11th Cir. 1982); Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), aff'd per curiam, 908 F.2d 695 (1990); Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989); Smith v. Zant, 664 F. Supp. 500 (M.D. Ga. 1987), aff'd by equally divided court, 887 F.2d 1407 (11th Cir. 1989); Johnson v. Kemp, 615 F. Supp. 355 (S.D. Ga. 1985), aff'd per curiam, 781 F.2d 1482 (1986).

[22] Follow-up research on the defendants whose cases are cited in n. 21 above show that three were wrongly convicted, see Wallace v. State, 188 Ga. App. 77 (317 SE2d 914) (1988) (acquitted of murder at second trial); Special Update: Georgia's Death Row, ATLANTA CONST., Nov. 17, 1996 at G8 (Gary Nelson was released after state withheld exculpatory

has previously recognized that due process may require appointment of counsel in circumstances where the risk of an erroneous decision is not nearly so great as in death penalty litigation: in proceedings to terminate parental rights,[23] adjudicate juvenile delinquency,[24] transfer prisoners to a

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information and did not retry him; Henry Arthur Drake was resentenced to life, but was released when it was learned that the state's main witness had lied). None of the others are currently under a death sentence. See Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) (en banc), (state barred from seeking death penalty in retrial); Brooks v. State, 262 Ga. 187 (415 SE2d 903) (1992) (following second trial in which the state sought the death penalty, he received a life sentence); see also Special Update: Georgia's Death Row, ATLANTA CONST., Nov. 17, 1996 at G8 (Victor Vernard Roberts and Eddie Lee Ross pled guilty and received life sentences; Walter Curry pled guilty and received a sentence of life without parole; David Alfred Jarrell's second death sentenced was reversed, see Jarrell v. State, 261 Ga. 880 (413 SE2d 710) (1992), and he pled guilty and promised not to seek parole; Tony Amadeo pled guilty and was sentenced to life after this Court reversed refusal to appoint previous counsel for retrial, Amadeo v. State, 259 Ga. 469 (384 SE2d 181) (1989); Janice Buttrum pled guilty and promised not to seek parole; Alphonso Morgan faced a second sentencing trial, see Morgan v. State, 257 Ga. 596 (361 SE2d 793) (1987), but was re-sentenced to life); Kenneth Hardy, John Michael Davis, Jimmie Burden, Jimmy Lee Horton, James Cunningham, Michael Gene Berryhill, Michael Albert Cervi, Charles Corn, Robert Franklin Godfrey, Dennis Dick, Charles Bowen, Horace William Dix, Donald Wayne Thomas, Joseph Wilson, Jr., Judson Ruffin, Joseph James Blake, Shirley Tyler, Robert William Strickland, William Alvin Smith and Johnny L. Johnson were resentenced to life; Bobby Gene Gaddis awaits resentencing following the 1981 vacating of the death penalty; Billy Sunday Birt, Norman Darnell Baxter, Carzell Moore, and Brandon Jones await resentencing); Retrial like a 'reunion' in Cobb, ATLANTA CONST., Feb. 22, 1999 at B1 (Floyd Ernest Hill was released after state could not find reliable witnesses to retry case). Whether Terry Lee Goodwin and Joseph Edward Thomas have been retried and sentenced is unclear; whether Gary Michael Floyd, Roland Paul Hamilton, and Wilburn Wiley Dobbs have been resentenced is unclear.

[23] Lassiter v. Department of Social Servs., 452 U.S. 18 (101 SC 2153, 68 LE2d 640) (1981).

[24] In re Gault, 387 U.S. 1, 41 (87 SC 1428, 18 LE2d 527) (1967).

state mental hospital,[25] and revoke parole,[26] and to misdemeanor criminal trials where even one day of imprisonment is imposed.[27]

In determining the requirements of "fundamental fairness," another relevant inquiry is the contemporary practice.[28] The federal government[29] and all other states provide a right to counsel in capital post-conviction proceedings.[30] Georgia is the only jurisdiction that fails to provide a right to counsel in capital post-conviction cases.[31] While it is true that the mechanism for appointed counsel in capital habeas proceedings usually has come about through the state legislature, this fact is irrelevant for constitutional analysis. If, as the majority concedes, contemporary practice

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[25] Vitek v. Jones, 445 U.S. 480, 496-497 (100 SC 1254, 63 LE2d 552) (1980).

[26] Gagnon v. Scarpelli, 411 U.S. 778, 791 (93 SC 1756, 36 LE2d 656) (1973).

[27] Argersinger v. Hamlin, 407 U.S. 25, 37 (92 SC 2006, 32 LE2d 530) (1972).

[28] See Cooper v Oklahoma, 517 U.S. 348 (116 SC 1373, 1380, 134 LE2d 498) (1996).

[29] 21 U.S.C. § 848(q)(4)(B).

[30] The Spangenberg Group, An Updated Analysis of the Right to Counsel and the Right to Compensation and Expenses in State Post-Conviction Death Penalty Cases," (American Bar Association Post-Conviction Penalty Representation Project, June 1996).

[31] Id. As of the date of the Spangenberg Group report, Wyoming also failed to provide counsel for death penalty inmates in post-conviction proceedings. However, Wyoming recently changed its law and now death penalty inmates are entitled to representation by the Wyoming state public defender in post-conviction proceedings. SEA 41, 55th Leg., 1999 Session (Wyo.) (to be codified at Wyo. Stat. Ann. § 7-6-104(c)(ii) (1999).

is relevant to determining the *constitutional* requirements, then there is no rational basis for distinguishing the source.[32] The fact that other state legislatures have provided for counsel in capital postconviction proceedings may be a strong policy consideration for Georgia's legislature, but it is a weak excuse for this Court to evade its responsibility to ensure the guarantees of the constitution.

The ultimate consideration and the one that underlies all these arguments is that death is different. Its finality as punishment demands special consideration.[33] The majority's response to the reality that "death is different" is to focus on the facts of this case and make the subjective determination that Gibson deserves the death penalty. That decision is never appropriate for this Court to make; it is the province of the jury. Even if it were an appropriate determination for this Court, it cannot justify the denial of due process. The majority's subjective conclusion that Gibson deserves the death penalty ignores the tenet that "fundamental fairness is the central concern of the writ of habeas corpus."[34] When a petitioner is on death row and pursuing his first habeas petition, there can be no glimmer of hope that fundamental fairness will prevail in the absence of counsel and, without a procedure for appointed counsel, the right to meaningful

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[32] Cooper, 116 SC at 1380 (In considering constitutionality of procedural rule, Court surveyed contemporary practice set forth in case law and statutes of the various states).

[33] Ake v. Oklahoma, 470 U.S. 68, 87 (105 SC 1087, 84 LE2d 53) (1985) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases."); California v. Ramos, 463 U.S. 992, 998-999 (103 SC 3446, 77 LE2d 1171) (1983) ("qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.").

[34] Strickland v. Washington, 466 U.S. 668, 697 (104 SC 2052, 80 LE2d 674) (1984).

access to habeas review under the Georgia Constitution is lost.

For all these reasons, I conclude that meaningful access to the right to seek habeas relief and fundamental fairness in those proceedings demand appointment of counsel for Gibson and I would reverse and would order a new habeas hearing following appointment of counsel.

Because the Court has not granted the certificate for probable cause to appeal, nor given the parties the courtesy of an opportunity to submit briefs on the alleged constitutional errors during the trial, I further believe that it is inappropriate to consider those issues as the Court does in division 2.

I am authorized to state that Chief Justice Benham and Justice Sears join in this dissent.

S97R1412. GIBSON v. TURPIN, WARDEN.

SEARS, Justice, dissenting.

I fully concur with the dissent. The official taking of a human life is the ultimate governmental exercise of control and power over individual liberty. If it is to be done, it must be done cautiously, dispassionately, soberly, and fairly. And fundamental fairness demands that a condemned prisoner have the benefit of competent counsel to articulate his constitutional claims and to navigate the procedural and substantive morass that is our habeas corpus law. If this were not so, all states but one that impose the death penalty would not require counsel in these cases. Nevertheless, the majority today joins that one state and requires a condemned man, without counsel, to bring his claims for relief in an arcane process that he can not possibly understand in a court of law that (most likely) will not be able to understand his constitutional concerns. This is an outcome that no just government should countenance. I am authorized to state that Chief Justice Benham and Presiding Justice Fletcher join in this dissent.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON,	*	
EF 261140,	*	
	*	CIVIL ACTION NO.
Petitioner,	*	95-V-648
	*	
v.	*	
	*	
ALBERT G. THOMAS, WARDEN,	*	
HABEAS CORPUS	*	
	*	
Respondent.	*	

FINAL ORDER

This is a habeas corpus case in which Petitioner, Exzavious Lee Gibson, is challenging his conviction and death sentence for malice murder. This case came before this Court for an evidentiary hearing on September 12, 1996. After careful consideration of the pleadings, evidence, and argument in this matter, this Court hereby ORDERS that habeas corpus relief be and is hereby DENIED.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner was indicted in the Superior Court of Dodge County, Eastman, Georgia, on February 20, 1990, for the February 2, 1990 malice murder and armed robbery of Douglas Coley. (R. 1). Petitioner was represented pre-trial, at trial, and on appeal by attorney W. Dennis Mullis of Cochran, Georgia. The trial in Petitioner's case was conducted June 11 through 14, 1991. On June 13, 1991, the

jury returned a verdict finding Petitioner guilty of malice murder and armed robbery. (R. 1). Following the sentencing phase of trial, the jury found the existence of two statutory aggravating circumstances, (1) that the offense of murder was committed while Petitioner was engaged in the commission of another capital felony, to wit: armed robbery, and (2) that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved an aggravated battery to the victim. (R. 4). The jury recommended the sentence of death, (R. 4), and Petitioner was sentenced to death for malice murder. (R. 5). Petitioner received a sentence of life imprisonment for armed robbery. (R. 7).

Petitioner's motion for new trial was filed on June 21, 1990, heard on December 17, 1990, and denied on January 4, 1991. (R. 195-197; 201). Petitioner filed a timely notice of appeal, and after briefing and oral argument, the Georgia Supreme Court affirmed Petitioner's convictions and sentences on June 10, 1991. Gibson v. State, 251 Ga. 313, 404 S.E. 2d 781 (1991).

In its opinion on direct appeal, the Georgia Supreme Court found the facts of Petitioner's case as follows:

> The victim operated a family-owned grocery store in Eastman. Late in the afternoon of February 2, 1990, Eastman's chief of police, driving by the store during a routine patrol, saw a crowd at the front entrance. A man ran to the chief's car and reported there was blood all over the store and no one visible inside. The chief radioed for assistance and then approached the store. The main entrance was locked. A member of the victim's family broke open a side door. The police chief entered the store and discovered the victim's

body "behind the counter and blood just totally everywhere."

A man had been seen running away from the store. One of the women in the crowd recognized him and knew where lived. She accompanied a police officer to the defendant's home. Leaving her in the car, the police officer went to the door, knocked, and asked permission to enter. A woman answered, telling the officer to come in. He opened the door and immediately noticed drops of fresh blood on the floor in the living room. The officer asked the woman if anyone had run into the house. She answered "her grandson" and directed him to a bedroom down the hall. The officer went to the bedroom. Looking from the doorway, he saw bloody money under the bed. The officer went to the bed and looked under it, saw the rest of the money (almost $500) and a wallet. He looked inside the wallet and determined that it belonged to the victim. Looking around, he saw some bloody clothes near a closet which fit the description of the clothing worn by the man seen running away from the store. The officer opened the closet door and found the defendant, "crouched down" and sweating profusely. He was arrested and taken to jail.

An autopsy was conducted on the body of the victim. He had been cut numerous times; some of the cuts were very deep while others were shallow. The autopsist testified that he found 39 "stab and slash and superficial cut wounds on (the victim's) body." The knife blade had broken off in the vertebrae of the

> victim's neck, severing the victim's spinal cord and immediately paralyzing him from the neck down. In the autopsist's opinion, many of the superficial wounds in the front of the victim's chest and neck were inflicted by what was left of the knife after it had broken in the victim's neck.
>
> The defendant confessed shortly after he was arrested. He first gave a written statement in which he acknowledged killing the victim, claiming he needed money for drugs. Later that evening, he gave a longer tape-recorded statement, in which he added that he had been in the store earlier that day and had used profanity in the presence of the victim, who had then lectured him about his behavior. The defendant stated that when he returned later, he intended not only to rob the victim but also "to hurt him" because "I didn't like him."

Gibson, 261 Ga. at 313-314.

The United States Supreme Court denied certiorari on February 24, 1992. Gibson v. Georgia, 502 U.S. 1101, 112 S. Ct. 1188 (1992) reh. denied 503 U.S. 999, 112 S.Ct. 1708 (1992).

On December 20, 1995, with no pending execution date, Petitioner filed a pro se state habeas corpus petition which had been prepared by the Georgia Appellate Practice and Resource Center on Petitioner's behalf, (Attachment to Petition, p.1).

No amendments to the petition were filed, and this Court scheduled an evidentiary hearing for September 12, 1996 on the claims Petitioner raised in his original petition.

At this hearing, Petitioner appeared pro se, (T. 1), and refused to go forward with his case. (T. 2-3). It is clear to this Court, given Petitioner's demeanor and his statements at the evidentiary hearing, that Petitioner made a conscious choice not to proceed with his case at the evidentiary hearing. (T. 1, 2, 3, 4, 16, 29, 38, 60, 62, 64, 65, 67, 69, 70). As discussed below, Petitioner is not entitled to counsel in this collateral, civil, habeas corpus proceeding; therefore, this Court proceeded with the evidentiary hearing.

It is well-established that there is no federal constitutional right to counsel for indigent petitioners in a capital habeas corpus proceeding. Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987), held that there is no constitutional right to appointed counsel in state post-conviction proceedings under the Sixth Amendment or the Due Process or Equal Protection guarantees of the Fourteenth Amendment. Murray v. Giarratano, 491 U.S. 1, 109 S. Ct. 2765 (1989), applied the rule of Pennsylvania v. Finely to state post-conviction challenges by death-sentenced inmates and rejected any distinction, for Pennsylvania v. Finley purposes, between capital and non-capital state post-conviction challenges under the Eight Amendment, the Due Process Clause, or the "right of access" concept of Bounds v. Smith, 420 U.S. 817, 97 S.Ct. 1491 (1977).

It is equally well-established that there is no state constitutional right to counsel for indigent petitioners in a capital habeas corpus proceeding. Croker v. Smith, 225 Ga. 529, 169 S.E. 2d 787 (1969), held that there is no right to counsel under the state constitution, Art. I, Sec. I, Para. XIV, because habeas corpus is not a criminal proceeding. McClure v. Hopper, 234 Ga. 45, 214 S.E.2d 503 (1975), recognized that any provision of counsel for habeas corpus proceedings would be the province of the legislature. Stephens v. Balkcom, 245 Ga. 492, 265 S.E.2d 569 (1980), confirmed that there is no state or federal right to counsel in state habeas corpus proceedings. The Court in

McCorquodale v. Stynchcombe, 239 Ga. 138, 236 S.E.2d 486 (1977), reasoned that because there is no state or federal constitutional right to counsel in a state habeas corpus proceeding, as a habeas corpus is not a criminal proceeding, the constitutional right to effective assistance of counsel does not apply to death penalty state habeas corpus proceedings. Finally, the Court in State of Georgia v. Davis, 246 Ga. 200, 269 S.E.2d 461 (1980), reaffirmed that indigent habeas petitioners are not entitled to appointed counsel, confirming that this holding applies equally to death-sentenced habeas corpus petitioners, and rejecting a claim that death-sentenced inmates are entitled to appointed counsel under either the "right to meaningful access" concept of Bounds, 430 U.S. 817, or because of the "irrevocability of death." Davis v. Thomas, 266 Ga. 835, 471 S.E.2d 202 (1996), recently reaffirmed this body of precedent, acknowledging, in the context of a death penalty habeas corpus proceeding, that the constitutional right of effective assistance of counsel does not apply in habeas corpus proceedings and that there is no right to appointment of counsel in habeas corpus proceedings.

Petitioner Gibson received the assistance of counsel during the entire course of his criminal proceedings as was his constitutional entitlement. Moreover, Petitioner's criminal proceedings progressed through a statutory framework legislatively designed to minimize the occurrence of any error in his death penalty trial. Unified Appeal Proceeding (UAP); O.C.G.A. § 17-10-36. Petitioner was also provided mandatory appellate review of his death sentence, O.C.G.A. § 17-10-35, although such review is not constitutionally required. See, e.g., Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871 (1984).

Petitioner, like all death-sentenced inmates in Georgia, was tried under Georgia's UAP which applies to any Georgia death penalty case during pretrial, trial, motion for new trial, and direct appeal proceedings. The UAP

utilizes a "checklist" of legal issues as a means of avoiding or promptly correcting error in order "to make certain that all possible matters which could be raised in defense have been considered by the defendant and defense counsel and either asserted in a timely and correct manner or waived in accordance with applicable legal requirements. . . ." O.C.G.A. § 17-10-36; UAP § I. Interim appellate review of pretrial rulings is contemplated under the UAP, and any issue ruled on in such review is res judicata and the law of the case. UAP § II (D-F). The express purpose of the UAP is "to insure that as many issues as possible which heretofore could be raised by writ of habeas corpus or other post-trial procedure were timely raised before or during trial." UAP § IV (2).

Petitioner received the appellate review which is statutorily-mandated for all Georgia death penalty convictions. O.C.G.A. § 17-10-35; Patillo v. State, 258 Ga. 255, 368 S.E. 2d 492 (1988).

During his pretrial, trial, motion for new trial, and direct appeal proceedings under the UAP, Petitioner enjoyed a constitutional and statutory entitlement to counsel. See, e.g., Williams v. Turpin, 87 F.2d 1204, 1210 (11th Cir. 1996).

Given the express emphasis placed on criminal trial and direct appeal proceedings, and in light of the constitutional framework discussed above, the Georgia General Assembly recognized the appropriate, collateral, role of the state habeas corpus proceedings. By statute, and as recognized in subsequent caselaw, the scope of habeas corpus proceedings has been narrowly defined, and the issues which can properly be addressed are limited. See, e.g. O.C.G.A. § 9-14-40 et seq.; Black v. Hardin, 255 Ga. 239, 336 S.E.2d 754 (1985); Gunter v. Hickman, 256 Ga. 315, 348 S.E. 644 (1986); Valenzuela v. Newsome, 253 Ga. 793, 325 S.E. 2d 370 (1985) (quoting Wainwright v. Sikes, 433

U.S. 391 (1977) in discussing "cause" and "prejudice" rule as having "the salutary effect of making the state trial on the merits the 'main even," so to speak, rather than a 'tryout for the road'"). As noted by Justice Harlan, "Habeas corpus has always been a collateral remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review." Mackey v. United States, 401 U.S. 667, 682, 91 S. Ct. 1160, 1175 (1971) (opinion concurring in judgments on part and dissenting in part) (emphasis in original) quoted in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 1073 (1989). "[D]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." Barefoot v. Estelle, 463 U.S. 88, 887, 103 S.Ct. 3383, 3391 (1982).

Since Petitioner is not entitled to the appointment of counsel in his collateral, civil, capital habeas corpus proceeding under either the federal or the state constitutions, and since the Georgia General Assembly has deliberately concentrated the State's resources at the trial and direct appeal stages of Georgia death penalty cases, and since the separation of powers doctrine forbids the entry of the judiciary into the legislative realm of government, this Court cannot invade the province of the legislature by appointing counsel to Petitioner to represent him in these habeas corpus proceedings.

CLAIMS NOT RAISED AT TRIAL AND/OR ON APPEAL ARE PROCEDURALLY DEFAULTED AND ARE PRECLUDED FROM REVIEW BY THIS COURT

Petitioner alleges the following claims as grounds for habeas corpus relief, each of which is procedurally defaulted:

(1) that the prosecution made allegedly prejudicial remarks during its opening statement, in violation of Petitioner's rights to due process and a fair trial under Art.

I, Sect. I, Paras. 1, 11, and 17 of the state constitution and 5th, 6th, 8th and 14th Amendments to the federal constitution;

(2) that the prosecution engaged in allegedly improper and highly prejudicial argument during its guilt/innocence phase closing argument, in violation of Petitioner's rights to due process and a fair trial;

(3) that the prosecution engaged in allegedly improper and prejudicial argument during its sentencing phase closing argument, in violation of Petitioner's rights to due process and a fair trial under Art. I, Sec. I, Paras. 1, 11, and 17 of the state constitution and 6th, 8th and 14th Amendments to the federal constitution;

(4) that the prosecution allegedly failed to disclose to Petitioner evidence allegedly in its possession which was allegedly "material, and exculpatory or favorable to Petitioner on issues of guilt and/or punishment" in violation of Petitioner's rights under Art. I, Sec. I Paras. 1, 2, 11, and 14 and 17 of the state constitution and 6th, 8th and 14th Amendments to the federal constitution, as set forth in Brady v. Maryland, 373 U.S. 83 (1963);

(5) that the Unified Appeal Procedure (UAP), (O.C.G.A. § 17-10-36), is unconstitutional on its face and as applied to Petitioner's case in violation of Petitioner's rights under Art. I, Sec. I, Paras. 1, 2, 11, 12, 14, and 17 of the state constitution and 5th, 6th, 8th and 14th Amendments to the federal constitution, specifically, due process, an alleged, "right to silence" defined as a "right to be heard through counsel" when represented by counsel, the right to counsel, and equal protection.

FINDINGS OF FACT

This Court finds that these allegations were not raised at trial, if appropriate, and on direct appeal as required by state law.

CONCLUSIONS OF LAW

O.C.G.A. § 9-14-48(d) provides:

> The court shall review the trial record and transcript of proceedings and consider whether the Petitioner made a timely motion or objection or otherwise complied with Georgia Procedural Rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffectiveness of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief should not be granted.

O.C.G.A. § 9-14-48 (d).

In interpreting this code section, the Georgia Supreme Court has held, "A failure to enumerate as error on appeal any alleged error or deficiency stands on like footing with a failure to make timely objection in the trial court - - that is, the same shall be waived. Being waived, there then exists a procedural bar to its consideration in habeas corpus proceedings, under the same circumstances as pertain to like waivers in the trial court." Black v. Hardin., 255 Ga. 239, 336 S.E.2d 754 (1985). Under O.C.G.A. § 9-14-48 (d) and the authority of Black v. Hardin, 255 Ga. 239, and

Valenzuela v. Newsome, 253 Ga. 793, 325 S.E.2d 370 (1985), claims not properly raised at trial and on appeal are procedurally defaulted and are precluded from review by this Court on their "merits" absent a showing by Petitioner of cause and actual prejudice sufficient to excuse Petitioner's procedural default of these claims, or of a miscarriage of justice.

To the extent that Petitioner attempts to establish "cause" based on his claim of ineffective assistance of counsel (e.g., Petitioner's ineffective assistance claims of failure to file proper pretrial motions and failure to object to closing argument), this Court holds that because, as addressed below, Petitioner's attorney was not ineffective, this allegation is insufficient to establish "cause" to excuse procedural default. In Devier v. Zant, 3 F. 3d 1445 (11th Cir. 1993), the petitioner in that case made a similar allegation of ineffective assistance of counsel as "cause," which he claimed was sufficient to excuse a procedural default under Georgia law of certain of his claims. Since the reviewing court found that Devier's attorneys "did not render ineffective assistance of counsel at various episodes during the trial and therefore cannot further conclude that the representation was pervasively deficient throughout the trial," the reviewing court found that the petitioner had presented insufficient cause to excuse the procedural default of these claims. Id. at 1454. Similarly, because ineffective assistance of counsel has not been established by petitioner (see infra, for this Court's findings of fact and conclusions of law on Petitioner's claim of ineffective assistance of counsel) his claim of ineffective assistance of counsel cannot provide "cause" for the procedural default of the claims listed above. See also Davis v. Williams, 258 Ga. 552, 553 (1988) (no showing of ineffective assistance of counsel such as to constitute "cause").

With respect to Petitioner's "Brady" claim, Petitioner fails completely to establish "cause" for a failure to have

raised this claim previously. Petitioner fails to identify any "evidence" the state allegedly withheld from Petitioner. Therefore, Petitioner necessarily fails to establish that the could not have presented this claim previously.

Petitioner has not shown cause for the failure to have raised this claims in a timely fashion. Because it is necessary that a petitioner establish both "cause" and "actual prejudice" in order to overcome procedural default, an insufficient showing on one prong obviates the need for examination of the other prong. However, this Court concludes that Petitioner has likewise failed to establish actual prejudice resulting from the failure to have raised these claims in a timely fashion.

Nor is review of these claims warranted to avoid a "miscarriage of justice" in this case, such as "the imprisonment of one who, not only is not guilty of the specific offense for which he is convicted, but, further, is not even culpable in the circumstances under inquiry." Valenzuela, 253 Ga. 796 (emphasis in original) (noting circumstance which might amount to a "miscarriage of justice," as more than mere procedural irregularity or reversible error is contemplated)/ Petitioner's case does not present circumstances amounting to a "miscarriage of justice."

Habeas corpus relief on these grounds is therefore denied.

EFFECTIVENESS OF COUNSEL

Petitioner asserts the following claims of ineffective assistance of counsel: (a) counsel failed to conduct an adequate pre-trial investigation into the State's case and defenses allegedly available to Petitioner; (b) counsel failed to file several unspecified motions pretrial to protect Petitioner's right to a fair trial; (c) counsel failed to conduct

an adequate examination of potential jurors to ensure that Petitioner received a fair and impartial jury and failed to object to the sitting of several unspecified venirepersons who allegedly could not impartially determine Petitioner's guilt or the appropriate punishment in this case; (d) counsel failed to confront adequately the State's case during the guilt phase of trial; (e) counsel failed to object to the admission of several unspecified items of evidence offered by the State during the guilt phase, objection to which would allegedly have resulted in this evidence not being admitted; (f) counsel failed to appropriately object to the allegedly improper closing argument of the prosecution at the conclusion of the guilt phase of trial; (g) counsel failed to give closing argument at the conclusion of the guilt phase which adequately exposed unspecified shortcomings of the State's case against Petitioner; (h) counsel failed to raise proper objections to unspecified allegedly improper charges given by the trial court to the jury at the conclusion of the guilt phase of trial; (i) counsel failed to properly object to unspecified items of allegedly improper evidence offered by the State in aggravation at the penalty phase of trial; (j) counsel failed to conduct an adequate pre-trial investigation into Petitioner's life and background to uncover and present unspecified evidence in mitigation, which Petitioner asserts would have been compelling; (k) counsel failed to object properly to unspecified allegedly misleading and improper arguments made by the prosecution during its penalty phase summation to the jury; (l) counsel failed to object to unspecified portions of the trial court's charge which allegedly failed to adequately define mitigating circumstances and allegedly misled the jury in other ways.

STANDARD FOR JUDGING CLAIMS OF INEFFECTIVE ASSISTANCE

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court adopted a two-pronged test for reviewing ineffective assistance of counsel claims.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

The Supreme Court of Georgia adopted the Strickland standard for judging claims of ineffective assistance of counsel in Smith v. Francis, 253 Ga. 782, 325 S.E.2d 362 (1985), and has articulated that standard as follows: "In order to establish that trial counsel's performance was so defective as to require a new trial, [the defendant] must show that counsel's performance was deficient and that the deficient performance so prejudiced [the defendant] that there is a reasonable likelihood that, absent counsel's errors, the outcome of the trial would have been different." Roberts v. State, 263 Ga, 807, 807-808, 439 S.E.2d 911 (1994). See also Bowley v. State, 261 Ga. 278, 280, 404 S.E.2d 97 (1991).

In reviewing counsel's representation of Petitioner, this Court heeds the principle established in Strickland that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This Court is reminded also that "[t]here are countless ways to provide effective assistance in any given

case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. at 689. Additionally, this Court is cognizant that "[j]udicial scrutiny of counsel's performance must be highly deferential, " Id., and that

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Id.

In judging claims of ineffective assistance, "counsel" is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 690. Accord Smith v. Francis, 253 Ga. at 783. See also Zant v. Moon, 264 Ga. 93, 97, 440 S.E.2d 657 (1994). Therefore, in reviewing the claims of ineffective assistance of counsel in the instant case, this Court will, as instructed in Strickland, "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. at 689 (citations omitted) quoted in Bowley, 261 Ga. at 280.

This Court will "judge the reasonableness of counsel's challenged conduct on the particular facts of the case, viewed as of the time of counsel's conduct," Id. at 690, and will not "speculate as to whether a different trial strategy might have been more successful." Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 844 (1993) (quoting Strickland, 466 U.S. at 690).

As the Georgia Supreme Court recognized in Zant v. Moon, the parameters set forth by the United States Supreme Court for considering ineffective assistance claims require a reviewing court to "address not what is prudent or appropriate, but only what is constitutionally compelled." Zant v. Moon, 264 Ga. at 95-96 (quoting Burger v. Kemp, 483 U.S. 776, 780 (1987)). "The object of an ineffectiveness claim is not to grade counsel's performance." Strickland, 466 U.S. at 697.

> The test for reasonable attorney performance "has nothing to with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial."

Jefferson v. Zant, 263 Ga. 316, 318, 431 S.E.2d 110 (1993) (quoting White v. Singletary, 972 F.2d 1218, 1220-1221 (11th Cir. 1992).

The proper focus of a court reviewing a claim of ineffective assistance should be to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 688.

Applying these principles to petitioner's claims of ineffective assistance, i.e., according a strong presumption in favor of effectiveness of Petitioner's counsel; viewing counsel's conduct from his perspective at the time of trial and appeal; presuming the reasonableness of trial strategy; giving recognition to the fact that even the most qualified counsel might represent a capital litigant differently depending, and finally, being aware that event the most experienced and effective attorney might be unable to prevent the imposition of the death penalty in a particular

case, this Court concludes that petitioner has failed to establish that he received ineffective assistance of counsel during either phase of trial or on direct appeal.

Petitioner was represented pretrial, at trial, and on direct appeal by attorney William Dennis Mullis. Mr. Mullis had been in practice in the Dodge County area for eleven years at the time of his representation of Petitioner and represented Petitioner in his capacity as contract public defender for Dodge County and two other counties in the Oconee Judicial Circuit, a position which he had held since the early 1980's and which he continued to hold until 1992. (T. 17-18). At the time of his representation of Petitioner, Mr. Mullis had handled "scores if not hundreds of felonies," including two prior death penalty cases. Mr. Mullis succeeded in securing a reversal on direct appeal of the death sentence in one of the two prior death penalty cases he handled, but that defendant, John Connor, was again sentenced to death at the resentencing trial. (T. 19-20). Mr. Mullis was able to draw on his experience in representing the defendants in the two previous death penalty cases in representing Petitioner in his death penalty trial. (T. 20).

Mr. Mullis met with Petitioner soon after Petitioner's arrest for the crimes in this case and had "many, many meetings" with Petitioner as the case progressed.. (T. 20-21). Petitioner appeared to Mr. Mullis to be rational and cooperative and was able to be helpful to the extent possible given the facts of the case. (T. 21-22). Mr. Mullis discussed with Petitioner the facts of the case, and Petitioner's own version of the events which he related to Mr. Mullis inculpated Petitioner in the crimes. (T. 28-29). Additionally, Petitioner had given two statements to police on the day of the crimes which were largely consistent with the version of events Petitioner related to Mr. Mullis and which also inculpated Petitioner in the armed robbery and stabbing murder of the victim. (T. 30).

Given the facts of the case and Petitioner's account of the crimes to Mr. Mullis, which was consistent with Petitioner's statements to police and which inculpated Petitioner as the perpetrator of the crimes, Petitioner was unable to provide Mr. Mullis with the names of any potential guilt phase defense witnesses. (T. 22). For similar reasons, Mr. Mullis decided not to seek funds from the trial court for an investigator, as Mr. Mullis felt that there was not a need in Petitioner's case given the state of the open file policy adopted by the state, the evidence in the case, and Petitioner's own statements to Mr. Mullis. (T. 26, 27, 55).

Because the state was seeking the death penalty against Petitioner, Mr. Mullis felt that it was appropriate to pursue the issue of Petitioner's mental competency. (T. 32-33). Mr. Mullis therefore petitioned for a mental examination, (R. 55), which the trial court granted. (R. 82). Petitioner was then evaluated by court-appointed psychologist Dr. Storms. Dr. Storms' report found Petitioner to fall within the antisocial continuum, to have engaged in some malingering, to have no psychotic symptoms, and to present no mental competency issues. Dr. Storm's report noted that the only possible mitigating factor presented as a result of his evaluation was that Petitioner's upbringing pointed him in the direction of the development of an antisocial personality disorder. Dr. Storms also noted in his report that Petitioner has a prior criminal history including a charge of theft and assault in Maryland in 1989 and a number of crimes in Florida and that he has been in trouble with the law for the majority of his life. The report also noted that he considered Petitioner to be dangerous and to be a possible escape risk. (R. 95; Resp. Ex. 1).

Mr. Mullis interviewed Dr. Storms by telephone following his evaluation of petitioner. (T. 34-35; Resp. Ex. 2c). Dr. Storms related that Petitioner has been in trouble with the law for most of his lift [sic] and had been institutionalized at institutions the functional equivalent of

Georgia's Youth Development Centers for his problems with the law. Mr. Mullis inquired about any history of child abuse, but Dr. Storms related that no such history had been uncovered. Dr. Storms related the petitioner's IQ has tested somewhere in the 80's and that neurological testing had come back completely negative for any neurological problems. Dr. Storms noted that Petitioner was well outside the range of mental retardation and also noted that Petitioner was "very street smart" and that it is probable that he could have tested higher on general information if he had put forth more effort in school. Dr. Storms also noted during his conversation with Mr. Mullis that Petitioner had not expressed much remorse for the crime. (Resp. Ex. 2c)

Following the court-ordered evaluation conducted by Dr. Storms, Mr. Mullis moved for an independent mental health evaluation by psychologist Dr. George Anderson, whose services Mr. Mullis had used on prior occasions. (5/29/80 T. 19; T. 33). The trial court granted an order for an independent psychological evaluation of Petitioner by Dr. Anderson, (R. 100), and Dr. Anderson evaluated Petitioner. The results of Dr. Anderson's confidential psychological evaluation of Petitioner revealed that Petitioner made little effort in taking the psychological tests administered to him, that he had no prior history of institutionalization for mental problems, that he had been in trouble with the law previously and had spent time in jail in Florida prior to moving to Eastman, Georgia, and that he had been raised by an aunt in Maryland after his mother died when he was two, had lived alone in Florida prior to moving to Eastman, and had finally lived with an aunt in Eastman. (Resp. Ex. 2a).

On the Wechsler Adult Intelligent Scale-Revised, petitioner scored a verbal IQ of 78, a Performance IQ of 76, and a Full Range IQ of 76, placing him in the Borderline Range of intelligence. However, in a telephone interview which Mr. Mullis conducted with Dr. Anderson following his evaluation of Petitioner, Dr. Anderson explained that

Petitioner was brighter than his IQ test scores reflected, that Petitioner had not applied himself while testing, and that Petitioner's IQ score was probably in reality at least 5 or 6 points higher than what he had tested. Dr. Anderson confirmed during the telephone interview that Petitioner was "certainly" and "clearly" not retarded. (Resp. Exs. 2a, 2b). A Wide Range Achievement Test-Revised score showed Petitioner" reading to be of the ninth grade equivalent and his arithmetic to be at the fifth grade equivalent; however Dr. Anderson noted in his report that Petitioner basically quit on the arithmetic section and therefore his score was likely not an accurate reflection of his arithmetic abilities. (Resp. Ex. 2a). A Mini-Mult test showed an exaggeration of symptoms but, to the extent the testing was valid, showed a pattern consistent with individuals who are:

> Depressed, tense, irritable, [ ] distrust people, [ ] keep people at a distance and [ ] have a good deal of hostility. It is common for juvenile delinquents to demonstrate this pattern. Individuals with this pattern are frequently found to be unpredictable and impulsive. They do not develop close relationships with other people and tend to distrust others. The (sic) frequently get into trouble because of their poor judgment and demonstrate some antisocial features. Individuals with this pattern who commit crimes are frequently found to carry out crimes that are poorly planned and poorly executed.

(Resp. Ex. 2a). Dr. Anderson made an Axis II major diagnosis of antisocial personality disorder.

Mr. Mullis felt that neither the evaluation of Petitioner by Dr. Storms nor the evaluation of Petitioner by

Dr. Anderson provided anything particularly beneficial to Petitioner's case. (T. 34-38). (Resp. Exs. 1, 2a 2b, 2c).

Because Petitioner claimed in his first statement to police, given within an hour of the commission of the murder and armed robbery of the victim in this case, that he had smoked crack approximately one hour prior to the crimes. (State's Ex. 7), Mr. Mullis considered the possibility of using Petitioner's claimed drug use as a possible defense to the crimes. However, Mr. Mullis rejected this as a possible defense both because voluntary intoxication is not a defense and because Mr. Mullis' own observations of Petitioner shortly after the arrest and throughout his representation of Petitioner failed to reveal anything consistent with Mr. Mullis' previous observations of defendant's suffering from drug withdrawal or from a sort of organic brain damage resulting from alcohol or drug abuse. Moreover, Petitioner did not relate any history of treatment for drug abuse, neither the court-appointed psychologist nor the independent psychologist uncovered any evidence of prior institutionalizations for drug use, and there seemed to be no evidence other than Petitioner's own anecdotal statements of a drug problem. (T. 38-40).

Additionally, this court notes that Petitioner did not make any mention in his second statement to police of having used drugs prior to the crimes in this case or of committing the crimes in this case in order to secure money to buy drugs. In fact, while Petitioner noted in this second statement that he committed the crimes in order to get money, instead of mentioning drugs in his second statement, Petitioner added that he had been scolded by the victim when he was in the store earlier in the day of the crimes and that he did not like the victim and wanted to hurt him. (State's Ex. 11A).

Mr. Mullis attempted to build on the evidence of a prior altercation or confrontation between Petitioner and the

victim in requesting a voluntary manslaughter instruction at the guilt/innocence phase of trial, although he did not believe this to be a likely verdict in the case given the evidence, (R. 21; 32), But this request was denied. (T. 39).

Mr. Mullis eventually determined as a strategic decision not to present defense testimony in the guilt-innocence phase of the trial, as there was nothing which Mr. Mullis felt would be helpful to Petitioner on the issue of guilt/innocence. (T. 55-56). Mr. Mullis considered but rejected the idea of entering a guilty plea to the crimes and presenting only the sentencing issue to a jury, concluding that there would be no tactical advantage gained from doing so. Mr. Mullis concluded that the state should still be held to its burden to prove guilt beyond a reasonable doubt and also believed that it would be advantageous to Petitioner to create as much of a record as possible to draw from for any possible future appeal in the case in the event of a conviction. (t. 56). With that strategy, Mr. Mullis decided to pursue several issues through motions, and additionally concentrated on cross-examination of state's witnesses at the guilt phase of trial.

Mr. Mullis moved at the first hearing in Petitioner's case for a copy of the indictment and list of witnesses in the case. (3/26/90 T. 4-5; R. 36), and pursuant to that motion, received the information sought, including supplemental witness lists. (T. 24; R. 58; R. 92; R. 98; R. 107).

Mr. Mullis also filed a motion for an in-camera inspection of the district attorney's file and for production of documents seeking disclosure of all exculpatory material, all statements, and reports of statements by Petitioner or witnesses, any offers of or requests for immunity or leniency concerning Petitioner or potential witnesses, and all scientific reports to which Petitioner was entitled. (R. 34). Mr. Mullis received copies of the statements of Petitioner to police, of the autopsy report in the case, and of the crime lab

reports, (T 30; R. 58; 92,98), and interviewed the autopsies, Dr. Kris Sperry prior to trial regarding Dr. Sperry's findings from the autopsy. (T 47-49). Additionally, the state engaged in an open-file policy whereby Mr. Mullis was permitted access to the state's file for inspection. (3/26/90 T. 9-10; 4/3/90 T. 5-6; R. 112). Mr. Mullis examined the district attorney's files and the Georgia Bureau of Investigation file in the case. (T. 22), and as a part of that review, examined the witness statements contained therein. In addition, Mr. Mullis conducted independent interviews of law enforcement personnel involved in Petitioner's case and also interviewed Vicky Jackson, the witness who has observed Petitioner running from the scene of the crimes and directed police to Petitioner's house. (T. 24-25). Finally, the trial court conducted an in-camera inspection of the state's file and thereafter entered an order finding that there be no mitigating or exculpatory evidence within the file. (R. 112).

Mr. Mullis sought to exploit a potential issue then being considered in the appellate courts of Georgia arising from a case out of the same circuit where Petitioner's case was being tried. That issue was the possibility that, pursuant to a subpoena for production of evidence in the possession of state's witnesses, Georgia Bureau of Investigation Crime Lab personnel would be required to produce all background information leading to their findings and conclusions on evidence in petitioner's case. To that end, Mr. Mullis spoke with fellow attorney Wash Larsen, the attorney who was advancing the argument for such production in the case then being considered in the appellate courts, Eason v. State, 194 Ga. App. 678 (1990) in which certiorari had been granted in the Georgia Supreme Court. Mr. Mullis researched the issue and received from Mr. Larson his brief on certiorari to the Georgia Supreme Court and the subpoena used by Mr. Larsen in the Eason case. (T. 49-50; Resp. Ex. 3). Mr. Mullis filed subpoenas for the production of evidence such as those used in the Eason case, (R. 113), and was met, as

he had anticipated, with motions to quash those subpoenas and request for sanctions against him. (T. 49; R. 137-194). Mr. Mullis continued to pursue this issue in Petitioner's case, seeking the background information from eight separate employees of the Georgia Bureau of Investigation Crime Lab, until he felt himself in danger of being held in contempt of court, at which point Mr. Mullis withdrew the subpoenas and determined instead to raise as an issue on any eventual direct appeal in Petitioner's case the assertion of being forced to withdraw the subpoenas, (T. 50).

In the interim between Petitioner's trial and his direct appeal, the Georgia Supreme Court issued its opinion on certiorari in Eason v. State, 260 Ga. 445, 396 S.E.2nd 492 (1990), holding that evidence such as memos, notes, graphs, printouts, and other data which a crime lab analyst relies on to support his or her testimony and opinion during direct examination is discoverable for crime lab witnesses who testify at trial. On appeal in Petitioner's case, however, the Georgia Supreme Court declined to grant any relief to Petitioner, as the only crime lab witness to be subpoenaed who thereafter testified at trial autopsist Dr. Sperry, testified that he had complied with the subpoena issued. Gibson, 261 Ga. at 315-316(6).

Mr. Mullis filed a motion for a pretrial hearing to determine the voluntariness of the signed statement which Petitioner gave to the Dodge County Sheriff on the day of the crimes, within an hour of the crime, and of the video-taped statement which Petitioner gave to law enforcement personnel later that evening. (R. 37; R. 52; R. 98). It was determined that in order to minimize any pretrial publicity which might be engendered through a public hearing on the voluntariness of Petitioner's statements prior to trial, the Jackson v. Denno hearing on the voluntariness of the statements would be held after the jury selection in Petitioner's case. (See, e.g., 4/3/90 T. 6-9; 5/29/90 T. 1-2). In that hearing, it was determined that Petitioner signed a

written waiver prior to giving each of the statements and admitted in each of the statements that he stabbed the victim for money. Petitioner noted in his first statement that he was arrested in his home approximately fifteen minutes after the crimes. Additionally, Petitioner admitted that he brought the murder weapon with him to the store from his home. In each account of the crimes which Petitioner gave to police, Petitioner stated that he simply walked into the store where the victim was standing behind the counter, and, without saying anything to the victim or asking the victim for money, attacked the victim with a knife and "just stabbed him." In his second statement to police, Petitioner said that he had no regrets about the crimes. (Tr. T. 210-238; State's Exs. 7, 11-A). The trial court ruled that both statements were voluntary and admissible but excluded the video-taped version of the second statement from evidence as it depicted Petitioner in handcuffs. (Tr. T. 235-238). Mr. Mullis noted at the habeas corpus evidentiary hearing that the exclusion of the video tape of Petitioner's statement from evidence inured to the benefit of Petitioner because his demeanor as seen on the videotape of the statement would have been very damaging to Petitioner's case. (T. 57).

Mr. Mullis also sought, through a motion to suppress, to have excluded from Petitioner's case physical evidence linking Petitioner to the crimes. (R. 65). When police, directed by witness Vickie Jackson, followed Petitioner to the home of his relative Addie Johnson (referred to as Petitioner's grandmother and as his aunt) at 804 Leitch Street, immediately following the crimes, police observed in plain view fresh blood on the floor of the residence leading to the back bedroom where Petitioner was discovered hiding in the closet, sweating profusely. Police also observed bloody money under the edge of a bed in the bedroom where Petitioner was hiding, the victim's wallet containing identification of the victim, bloody clothing matching the description of clothing Petitioner was wearing when observed in the vicinity of the victim's store prior to

the commission of the crimes in this case and sweaty, bloody clothing matching the description of clothing worn by a subject fleeing the scene of the crimes, including a pair of black Reebok tennis shoes. Police also found a bloody washrag in the bathroom of the residence. (Tr. T. 177-2-202). At the scene of the crime, police recovered a bloody rag, the knife used to kill shopkeeper Douglas Coley, the blade of which was broken off in the victim's back and the handle and remaining portion of which was found lying next to the victim's body, and bloody shoeprints. Mr. Mullis moved to suppress this evidence, (R. 65), and a hearing was held on that motion. (Tr. T. 175-209), 222-227). The trial court denied Petitioner's motion to suppress, finding that Petitioner's relative Addie Johnson had consented to the entry of the police into her home, that police were in lawful pursuit of Petitioner when they entered the home, that the items of evidence viewed by police once in the home were in plain view. The trial court also relied on the fact that Petitioner subsequently signed consent forms to search his bedroom and seize evidence therefrom and that police obtained a valid search warrant pursuant to which they secured blood samples and fingerprint and palm print samples from petitioner. (Tr. T. 234-235).

Among his efforts relating to the choice of a jury in Petitioner's case, Mr. Mullis, on March 27, 1990, filed a motion for change of venue to be ruled on following voir dire. (R. 39). Thereafter, on April 16, 1990, Mr. Mullis filed a second motion for change of venue, asserting that because of pretrial publicity in the case, it would be impossible for Petitioner to get a fair trial in Dodge County. (R. 87). Mr. Mullis believed that because Eastman is a small town and the victim was well-known in the community through operating the family-owned convenience store in Eastman which the scene of the crimes, and because of pretrial news coverage of the case, a motion for change of venue was appropriate. (T. 42-43). Mr. Mullis presented in support for his April 16, 1990 motion for change of venue

three local newspaper articles on the crimes and on Petitioner. (5/22/90 T. 10-13). The trial court denied the motion at that time but deferred final ruling until after voir dire; however, following voir dire, the court ruled to deny a venue change in Petitioner's case. (Tr. T. 157-158).

In a related effort to secure an untainted jury for Petitioner's trial, Mr. Mullis moved to exclude the news media from pretrial motions hearings or to have said hearings held in chambers. (R. 62). This motion, however, was also denied by the trial court. (5/29/90 T. 1-5).

Focusing on the voir dire itself, Mr. Mullis filed a motion for individually sequestered voir dire, (R. 42), a motion for an order requiring that jury questionnaires be sent to potential jurors, (R. 69), a motion to prohibit the district attorney from asking statutory voir dire questions of prospective jurors, (R. 75), a motion to put each individual juror to a reverse-Witherspoon question, (R. 109), and a motion for a sentencing phase voir dire to proceed the penalty phase of trial if Petitioner was found guilty during the guilt/innocence phase of trial. (R. 79). The trial court granted Petitioner's motion to submit juror information questionnaires to the prospective jurors, and a four-page juror questionnaire was sent to all prospective jurors. (R. 102). In addition to the information gained as a result of the juror questionnaires, Mr. Mullis had a personal familiarity with the local population as much of his general practice came out of Dodge County. Mr. Mullis also asked others about the potential jurors. (T. 43-44). The trial court denied Appellant's motion for an individual sequestered voir dire, opting instead to voir dire the potential jurors in panels; however, the trial court informed Mr. Mullis that it would reconsider that ruling if it appeared that the voir dire of the potential jurors by panels was insufficient. (Tr. T. 10). The jurors were asked, in panels, the "reverse-Witherspoon question." Additionally, the trial court, and not the district attorney, posed the statutory voir dire questions to the jurors.

(Tr. T. 13-156). As the jurors in Petitioner's case were voir died prior to being placed on the petit jury in Petitioner's case regarding whether they could consider both life imprisonment and the death sentence and not automatically vote for a death sentence if Petitioner were found guilty, no separate voir dire between the guilt/innocence phase and the sentencing phase of Petitioner's trial occurred. Mr. Mullis saw no problem with the racial composition of the jury eventually struck in Petitioner's case or with the use of the prosecution's peremptory strikes. (T. 44-45).

During the guilt-innocence phase of trial, Mr. Mullis elicited on cross-examination from the victim's son admissions that he had seen no weapon on Petitioner when he observed Petitioner outside of the family grocery store prior to the crimes in this case, that he had not seen Petitioner enter or exit the store, and that Petitioner had not appeared to the victim's son to be behaving suspiciously outside of the store. (Tr. T. 259-262).

Mr. Mullis was able to call into question the integrity of the crime scene evidence through cross-examination of the police chief who happened upon the scene while driving by. This witness admitted on cross-examination by Mr. Mullis that the front door of the store had been unlocked for a time after the perpetrator left the store and the arrival of the police chief, that the police chief was not the first person to enter the scene, and that at least one other person had been inside the store after the incident but before police arrived. (Tr. T. 271-274).

Mr. Mullis cast further suspicion on the conduct of police in the case with an admission on cross-examination of police officer Taylor that he had failed to get the name of an alleged witness to the perpetrator's flight and had not attempted to secure that information later. (Tr. T. 290-293).

Finally, Mr. Mullis secured an admission by the autopsist Dr. Sperry on cross-examination that the doctor had told Mr. Mullis differently that he had testified on direct examination when Mr. Mullis interviewed the doctor about his findings prior to trial. The implication of the doctor's testimony on direct examination at trial was that the victim had been stabbed with the broken knife after the tip of the knife had broken off in a wound to the victim's neck. The doctor was forced to admit that he had told Mr. Mullis previously that it was possible that the wound to the victim's neck, where a portion of the knife blade broke off, was the final wound to the victim and that it was in fact possible that no wounds were inflicted on the victim after this wound to the victim's neck. (Tr. T. 344-349). Mr. Mullis believed this issue to be particularly important for sentencing purposes. (T. 47-49).

Mr. Mullis attempted to utilize in mitigation during the sentencing phase of trial Petitioner's claims that he had used crack cocaine prior to the crimes in this case and committed the crimes in this case because he needed money for more drugs and that the victim in this case had engaged in a confrontation with Petitioner. This information was presented through the testimony of Petitioner himself. Mr. Mullis direct examination of Petitioner elicited from Petitioner the factors underlying his commission of the crimes, specifically his state of mind as being influenced by drug use on the day of the crime, his drug-induced drive to get more money so that he could buy more drugs, and an altercation between Petitioner and Mr. Coley leading to Petitioner's sudden stabbing of Mr. Coley. Petitioner also testified as to his remorse and revealed that he was only seventeen at the time of the crimes. (Tr. T. 430-437).

As part of his mitigation strategy, Mr. Mullis attempted to provide the jury with reasons to return a verdict of life imprisonment instead of the death penalty against Petitioner. For example, in preparing Petitioner to testify in

mitigation, Mr. Mullis conveyed to Petitioner the importance of providing the jury with a reason that Petitioner's life should be spared. (T. 57). Mr. Mullis was aware that Petitioner had had problems with the law, including problems in Maryland and Florida prior to coming to Eastman, Georgia, and Mr. Mullis was aware that Petitioner had also been charged in Eastman with the commission of a robbery alleged to have been committed the day before the crimes in the instant case. (T. 59; Resp. Exs. 2a, 2b, 2c). Mr. Mullis evaluated this evidence of Petitioner's prior trouble with the law to have no mitigating value and in fact to have potential aggravating value and therefore directed his efforts towards keeping any such information regarding Petitioner's prior criminal troubles out of the jury's consideration in the case. Mr. Mullis also felt that such information would have been inconsistent with the picture the defense wanted to present to the jury of Petitioner as a young man deserving of the jury's mercy. (T. 52, 59-60).

Mr. Mullis was also aware of an escape attempt by Petitioner while incarcerated awaiting trial on the crimes in the instant case. (T. 60). Evidence of that escape attempt in the form of a letter written by Petitioner to jail personnel bragging about his escape plan and of drawings made by Petitioner on the envelope containing the letter was introduced by the state in aggravation at sentencing. (State's Ex. 58; Resp. Ex. 4). Mr. Mullis objected to the introduction of this evidence, claiming the escape attempt was irrelevant to sentencing issues and injected an unindicted crime into the case; however, the trial court admitted the evidence. Mr. Mullis had expected the evidence would come in and had, in fact, discussed with Petitioner the fact that the state would probably present that evidence in aggravation at sentencing. (T. 62).

In order to mitigate any adverse effect which the evidence of the escape attempt might have on the jurors, Mr. Mullis attempted through Petitioner's testimony to establish

that Petitioner had not actually sought to escape incarceration completely out of desire to abscond, but was merely trying to get away from the stark and lonely circumstances present in the Eastman City Jail lockup. (T. 63-64; Tr. T. 435-436).

Petitioner provided Mr. Mullis with the names of family members and acquaintances as potential mitigation witnesses, (T. 22), and Mr. Mullis attempted to emphasis to the jury Petitioner's youth and his lack of a strong home life and his upbringing and family circumstances resulting in Petitioner being "from pillar to post all of his life." (T. 52). Mr. Mullis was aware that Petitioner's mother had been deceased since Petitioner was two years old, herself the victim of a homicide, and that Petitioner's father had had no role in Petitioner's upbringing. (T. 53-54). Mr. Mullis presented that information about Petitioner's biological parents as mitigating evidence. (T. 54, Tr. T. 417-419).

Mr. Mullis decided to present in mitigation the testimony of Minnie Faustine Christopher, Petitioner's aunt, who had raised him in Maryland from the time of this mother's death until he moved to Florida shortly before coming to Eastman, Georgia. Mr. Mullis spoke as well to Petitioner's aunt in Florida, LuLu Jackson, and to Petitioner's aunt or grandmother in Eastman, Georgia, Addie Johnson. However, Mr. Mullis decided to proceed with mitigation testimony only from Faustine Christopher as, in Mr. Mullis' dealings with Petitioner's relatives, Ms. Christopher was the relative who took the most interest in Petitioner and his situation. (T. 53-54).

Mr. Mullis considered a claim by Petitioner to Mr. Mullis that Ms. Christopher had "abused" him. However, this "abuse" appeared to have been at most an overuse of corporal punishment in disciplining Petitioner, and Mr. Mullis was unable to substantiate any abuse in Petitioner's childhood through other family members or through

Petitioner's own accounts of his childhood. For instance, Petitioner never related any history of the authorities becoming involved in Petitioner's homelife with Ms. Christopher. (T. 57-58). Mr. Mullis rejected the idea of having Petitioner testify to this claim not believing it to be productive in terms of their mitigation case. (T. 59).

In addition to the testimony of Ms. Christopher and of Petitioner himself, Mr. Mullis also presented the testimony of Sharon Lumpkin Jordan, who had known Petitioner since his move to Eastman, and who was able to testify that her impression of Petitioner was that Petitioner had always appeared quiet, well-mannered, and polite and have never appeared angry or violent or to be using drugs. (Tr. T. 427-429).

On cross-examination of Petitioner, the state posed a question of Petitioner mentioning experts that say the effects of crack cocaine last approximately fifteen minutes, (T. 437), and Mr. Mullis objected, and the state withdrew the question. Mr. Mullis then moved for a mistrial, but the trial court denied that motion, instructing the jury to disregard anything they had heard in that question and instructing the jury that it should have no bearing in the jurors minds on the decision to be made.

Mr. Mullis' closing argument in mitigation emphasized Petitioner's age, arguing that while the crimes committed by Petitioner were bad, a sentence less than death could have the effect of punishing Petitioner and of reforming him, arguing that in even ten years, Petitioner would be mature enough not to commit such a crime. Mr. Mullis also argued that the Christian response to a crime such as Petitioner's was not retribution and "an eye for an eye" but rather, the teachings of Jesus of forgiveness and letting him who is without sin cast the first stone. Mr. Mullis concluded his closing argument with a recognition that

Petitioner must be punished but "begging" the jury to save Petitioner's life. (Tr. T. 461-463).

On appeal, Mr. Mullis relied on his own recollections of the trial, reviewed the trial transcript for possible error, gave consideration to the applicable case law, and discussed the case and the potential appeal with Petitioner. Petitioner had no particular issues which he wanted to see raised on appeal, (T. 66-67), and Mr. Mullis focused on rulings on motions which the defense had made and no potential trial court error. On appeal, Mr. Mullis alleged error in the trial court's failure to grant Petitioner's motion for change of venue; the trial court's failure to grant Petitioner's motion to require the state to submit their requests to charge at least twenty-four hours prior to trial; the trial court's failure to grant Petitioner's motion to exclude the media from pretrial hearings; the trial court's failure to suppress items of evidence seized from Petitioner's residence; the circumstances resulting in the defense feeling compelled to withdraw their subpoenas for state crime lab information; the trial court's failure to grant a mistrial after testimony by a police officer concerning an alleged spontaneous statement by Petitioner's grandmother, Addie Johnson, during the police entry into Ms. Johnson's home; the trial court's error in admission of certain evidence specifically, photographs of the victim's body; the trial court's admission of the "escape attempt" letter by Petitioner at the sentencing phase of trial; the trial court's denial of a mistrial following the state's reference to opinions of expert witnesses not presented at trial; the trial court's instructions to the jury on mitigating circumstances; and the allegedly excessive and disproportionate nature of the sentence of death imposed on Petitioner. (Appellant's Brief and Enumeration of Error).

In the instant case, Mr. Mullis performed with reasonable effectiveness in representing Petitioner. As the Eleventh Circuit stated in Waters v. Thomas, 46 F.3d 1506 (11th Cir. 1995), "The test for ineffectiveness is not whether

counsel could have done more; perfection is not required." Waters v. Thomas, 46 F.3d at 1518 (quoting Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992) ("Trial counsel did enough. A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.")). Mr. Mullis made strategic decisions regarding where to focus the defense efforts, what motions to file, what investigation to make and pursue, and what witnesses to call.

> The strategy [the petitioner's] counsel chose did not work, but that does not establish that it was an unreasonable one. See, e.g., Fleming v. Kemp, 748 F.2d 1435, 1452 (11th Cir. 1984) ("A defense attorney is not ineffective soley because his client is sentenced to death."), cert. denied, 475 U.S. 1058, 106 S.Ct. 1286, 89 L.Ed.2d 593 (1986); Alvord v. Wainwright, 725 F.2d 1282, 1289 n. 12 (11th Cir.) ("[Trial counsel]) cannot be faulted simply because he did not succeed."), modified, 731 F.2d 1486, cert. denied, 469 U.S. 956, 105 S.Ct. 355, 82 L.Ed.2d 291 (1984); Romero v. Lynaugh, 884 F.2d 871, 877 (5th Cir. 1989) ("Had the jury returned a life sentence the strategy might well have been seen as a brilliant move. That it did not does not mean that it was outside the range of reasonable professional assistance."), cert. denied, 494 U.S. 1012, 110 S.Ct. 1311, 108 L.Ed.2d 487 (1990).

Waters, 46 F.3d at 1522-1523.

> Which witnesses, if any, to call, and when to call them, is the epitome of a strategic decision, and it is one that we will seldom, if ever, second guess. See Solomon v. Kemp, 735 F.2d 395, 404 (11th Cir. 1984) ("While attorneys may disagree as to how many or what particular witnesses to call, such is the stuff out

of which trials are made."), cert. denied, 469 U.S. 1181, 105 S.Ct. 940, 83 L.Ed.2d 952 (1985).

Waters, 46 F.3d at 1512.

Moreover, as the Eleventh Circuit has reiterated on many occasions, "The mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Cape v. Francis, 741 F.2d 1287, 1301 (11th Cir. 1984) quoted in Waters v. Thomas, 46 F.3d 1506, 1513-1514 (11th Cir. 1995); Atkins v. Singletary, 965 F.2d at 960; Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987).

Mr. Mullis made a reasonable assessment, given the evidence in this case, to focus on motions and not to present guilt-innocence phase evidence. Given the findings made by the psychologists in this case of anti-social personality disorder, it was reasonable not to pursue a mental health defense or mitigation strategy. Likewise, it was reasonable, from Mr. Mullis perspective at the time, not to pursue a drug-based defense or mitigation strategy. The investigation conducted by Mr. Mullis was reasonable given the findings of the psychologists regarding Petitioner's background and history and the information provided to Mr. Mullis by Petitioner himself, and the decision to focus on Petitioner's youth and the circumstances of his rearing through the testimony of Ms. Christopher and Petitioner was likewise reasonable.

"Counsel makes a reasonable strategic decision to present less than all possible available evidence in mitigation." Mitchell v. Kemp, 762 F.2d 886, 899 (11th Cir. 1985) quoting Stanley v. Zant, 697 F.2d 955, 965 (11th Cir. 1983). In Jackson v. Herring, 42 F.3d 1350 (11th Cir. 1995), the Eleventh Circuit noted, "In order for counsel to make a professionally reasonable decision whether or not to present

certain mitigating evidence -- in this case any mitigating evidence -- that counsel must be informed of the available options." Id. at 1366. The Court explained, "although counsel need not 'investigate every evidentiary lead,' he must gather enough knowledge of the potential mitigation evidence to arrive an 'informed judgment' in making that decision." Id. (citing Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, 493 U.S. 1011 (1989)).

In defining the standard in Strickland for judging the reasonableness of an attorney's decision regarding the scope of an investigation, the United States Supreme Court held:

> "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Strickland, 466 U.S. at 690-691.

The Court then instructed that a reasonableness assessment of a decision not to investigate must take into account "all the circumstances," including information supplied by the defendant, and must apply "a heavy measure of deference to counsel's judgments." Id. at 691.

The Eleventh Circuit applied this Strickland standard to evaluate a habeas corpus claim by a death-sentenced inmate in Rogers v. Zant, 13 F.3d 384 (11th Cir. 1994), that his counsel were ineffective for failing to present evidence and argument about the petitioner's drug use when they had not investigated the drug's psychological and behavioral effects on users. The Eleventh Circuit rejected as incorrect the district court's apparent conclusion that "'thorough investigation' must precede all strategic decisions or the decision will probably be ineffective in the constitutional

sense." Rogers, 13 F.3d at 387 (emphasis in original). In doing so, the Eleventh Circuit noted the United States Supreme Court's recognition in Strickland that effective counsel may "make a reasonable decision that makes particular investigations unnecessary." Id. at 386 (quoting Strickland, 466 U.S. at 690-691).

In deciding that counsel acted reasonably in Rogers in declining to investigate further the issue of the petitioner's drug use for purposes of guilt or sentencing, the Eleventh Circuit instructed:

> By its nature, "strategy" can include a decision not to investigate. Strickland indicated clearly that the ineffectiveness question turns on whether the decision not to make a particular investigation was reasonable. 466 U.S. at 691, 104 S.Ct. at 2066. This correct approach toward investigation reflects the reality that lawyers do not enjoy the benefit of endless time, energy or financial resources. See Atkins, 965 F.2d at 959-60 (noting that "[a]t some point, a trial lawyer has done enough," and that "[a] lawyer can almost always do something more in every case"); Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989) (as long as decision was reasonable under circumstances, counsel may forego line of defense without first investigating it substantially).

Rogers. 13 F.2d at 387.

In this case this Court concludes that Mr. Mullis had sufficient evidence to make an informed decision as to what investigation to pursue and that his decision not to pursue other investigation was therefore reasonable. Mr. Mullis' strategy decisions regarding the investigation to pursue and the evidence to present in this case fell within the range of competent assistance and were not "so patently unreasonable that no competent attorney would have chosen it." Adams v.

Wainright, 709 F.2d 1443, 1445 (11th Cir. 1983) (citations omitted).

Similarly, decisions such as what evidence to present and what objections to make are at their core strategy decisions. While Petitioner has not alleged in the instant case any specifics as to what objections he believes should have been made which were not made or what evidence should have been made which were not made or what evidence should have been presented which was not presented, this Court has not in its review of the record uncovered any error by counsel requiring a finding of ineffective assistance of counsel.

> A jury trial is, by its nature, an enterprise that is filled with imponderables from the viewpoint of a trial lawyer. It is an undertaking that calls not only on the lawyer's head, but also on his [or her] heart and nerve. At times in the trial arena, audacity or imagination or patience accomplish more than pure logic might suggest is possible. The true is that it is often hard for even a good lawyer to know what to do. Trying cases is no exact science. And, as a result, we must never delude ourselves that the fair review of a trial lawyer's judgment and performance is an activity that allows for great precision or for a categorical approach. When reviewing whether an attorney is ineffective, courts "should always presume strongly that counsel's performance was reasonable and adequate" Atkins v. Singletary, 965 F.2d 952, 958, (11th Cir. 1992). And "a court should be highly deferential to those choices . . . that are arguably dictated by a reasonable trial strategy." Devier v. Zant, 3 F.3d 1445, 1450 (11th Cir. 1993).
>
> Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown

> that no reasonable lawyer, in the circumstances, would have done so. This burden, which is petitioner's to bear, is and is supposed to be a heavy one. And, "[w]e are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial . . . worked adequately." See White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992). Therefore, the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.

Rogers v. Zant, 13 F.3d at 386.

"Even assuming the existence of judgmental and tactical errors, such errors do not always equate ineffective assistance of counsel." Bonds v. State, 203 Ga. App. 51, 54, 416 S.E.2d 329 (1992).

Moreover, in the instant case, this Court does not find prejudice from any possible errors by counsel. The evidence in this case established that Petitioner came to the Coley family grocery store on the day of the crimes armed with a knife which he had brought with him from his home, that he "cased" the store, waiting until it was empty to enter, that he engaged in subterfuge to accomplish his watch on the store, and that he, by his own admission, entered the store to rob the victim but without even asking the victim to turn over the money, approached the victim upon entering the store and attacked the victim with the murder weapon, stabbing the victim thirty-nine times, with so much force that the knife blade used in the attack eventually broke off in the victim's neck.

Habeas corpus relief on Petitioner's claim of ineffective assistance of counsel is denied.

CONCLUSION

After considering all of Petitioner's allegations made in the habeas corpus petition and at the habeas corpus hearing, this Court concludes that Petitioner has failed to carry his burden of proof in demonstrating any denial of his constitutional rights as set forth above.

WHEREFORE, it is hereby ORDERED that the petition for a writ of habeas corpus be denied and that Petitioner be remanded to the custody of Respondent.

If Petitioner desires to appeal this Order, Petitioner must file a written application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within 30 days from the entry of this Order and also file a notice of appeal with the Clerk of the Superior Court of Butts County.

The Clerk of the Superior Court of Butts County shall mail a copy of this order to Petitioner, Respondent, the Resource Center, as amicus curiae, and the Office of the Attorney General for the State of Georgia.

SO ORDERED this the 6th day of March, 1997.

/s/ J. Carlisle Overstreet
J. CARLISLE OVERSTREET, Judge
Superior Court of Butts County
Sitting by Designation

Prepared by:

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SUPREME COURT OF GEORGIA

Case No. S97R1412 Atlanta, April 09, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

EXZAVIOUS LEE GIBSON v. TONY G. TURPIN, WARDEN

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Benham, C.J., Fletcher, P.J., and Sears, J., who dissent.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the

meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously

discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during

Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

28 U.S.C.A. § 2244

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted

by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the

court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post- conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Georgia Uniform Superior Court Rule 44

Rule 44. Habeas corpus proceedings in death sentence cases.

44.1. Application
This rule shall apply to all petitions seeking, for the first time, a writ of habeas corpus in state court proceedings for those cases in which the petitioner has received a sentence of death. OCGA 9-14-47.1.

44.2. Request for judicial assignment
Within ten days of the filing of such a petition, the superior court clerk of the county where the petition is filed shall serve a copy of the petition upon the Executive Director of the Council of Superior Court Judges of Georgia. This service may be effected by mail and will constitute a request for judicial assistance under OCGA 15-1-9.1 (b) (3).

44.3. Respondent's answer or motion to dismiss
The respondent shall answer or move to dismiss the petition within 20 days after the filing of the petition or within such further time as the court may set for good cause shown.

44.4. Assignment of judge for habeas corpus proceedings
(A) The Executive Committee of the Council of Superior Court Judges shall promulgate guidelines for the assignment of such cases to the various superior court judges throughout Georgia, and shall provide that the case will not be assigned to a judge within the circuit in which the sentence was imposed. Within 30 days after the Executive Director receives the petition, the president of the council shall assign the case to a judge in accordance with the guidelines.
(B) Pending assignment of a judge, or during a later vacancy of an assigned judge, a presiding judge of the court in which the petition is filed shall be authorized to act on emergency matters unless otherwise disqualified by Uniform

Superior Court Rule 25.

44.5. Preliminary conference and scheduling
The assigned judge may wish to consider scheduling a preliminary conference with counsel for the petitioner and respondent as soon as practical. This conference may be conducted by telephone. The court may also wish to enter a scheduling order establishing specific dates in accordance with the guidelines set forth in this rule. The court may on its own or on motion of either party shorten any time period set forth hereinafter, and may extend such time period for good cause.

44.6. Motions
Within 60 days after the filing of the petition, the petitioner may file pretrial motions. Within 90 days after the filing of the petition, the respondent may file any motions. Responses to motions shall be governed by Rule 6.2.

44.7. Amendments to the petition; discovery
No later than 120 days after the filing of the petition, the petitioner may amend the petition, and if discovery is allowed pursuant to OCGA 9-14-48 it shall be completed.

44.8. Pretrial conference
The court may wish to schedule a pretrial conference with counsel for the petitioner and the respondent and enter an appropriate pretrial order for proceedings in the case. This conference may be conducted with counsel only and by telephone if appropriate.

44.9. Evidentiary hearing
Within 180 days after the filing of the petition, the court shall conduct an evidentiary hearing as provided by OCGA 9-14-47 and 9-14-48.

44.10. Preparation of transcript

The evidentiary hearing shall be transcribed by a court reporter designated by the court hearing the case as set forth in OCGA 9-14-50. Within 30 days after the evidentiary hearing, the transcript of the evidentiary hearing shall be made available to the parties and the court.

44.11. Briefing
Within 60 days after the evidentiary hearing, the petitioner may file any brief and if so directed by the court shall file proposed findings of fact and conclusions of law and a proposed order. Within 90 days after the evidentiary hearing, the respondent may file any responsive brief and if so directed by the court shall file proposed findings of fact and conclusions of law and a proposed order. Within 100 days after the evidentiary hearing, the petitioner may file any additional responsive brief.

44.12. Ruling on petition
Within 90 days of the filing of the respondent's brief, or the petitioner's reply brief if one is filed, the court shall issue its ruling on the petition and its written findings of fact and conclusions of law as required by OCGA 9-14-49.

44.13. Effect of rule
Upon application of any party, the Supreme Court may order such relief as it finds necessary to assure compliance with this Rule. This Rule provides procedural guidelines and no substantive rights are hereby conferred upon any person. No violation of this Rule shall be the basis of any grant of habeas corpus relief.

732 So. 2d 187 (Miss. 1999)

Supreme Court of Mississippi.

Decided:
January 28, 1999

No. 98-DR-00708-SCT. JACKSON v. STATE OF MISSISSIPPI.

ON MOTION FOR REHEARING ON MOTION FOR APPOINTMENT OF COUNSEL AND PAYMENT OF REASONABLE LITIGATION EXPENSES

McRAE, Justice, for the Court:

P 1. The original opinion is withdrawn, and this opinion is substituted therefor. Henry Curtis Jackson, Jr. seeks to have the State provide attorney compensation and reasonable litigation expenses in his attempt to seek post-conviction relief pursuant to Miss.Code Ann. § (1994), et seq. for his conviction and death sentence. This Court has previously denied all motions in other capital cases requesting similar relief. See Lockett v. State, 614 So.2d 888 (Miss.1992). Over the years, it has become apparent that the system is flawed. Valuable time and resources are being wasted in finding representation for death row inmates seeking post-conviction relief, especially since all remedies available under the UPCCRA must be exhausted before federal habeas relief may be sought. We find at this time that recognition of the nature of death penalty litigation in the courts of this state, coupled with the ultimate penalty the State seeks to impose, requires that the motion be granted, that counsel be appointed, and that reasonable expenses of litigation be allowed.

I.

P 2. Henry Curtis Jackson, Jr. was convicted of capital murder and sentenced to death in the stabbing deaths of four nieces and nephews in Leflore County Circuit Court in 1991. See Jackson v. State, 684 So.2d 1213 (Miss. 1996). Jackson was represented by Johnnie Walls at trial and on direct appeal. After Jackson's conviction and death sentence were affirmed by this Court, Walls failed to file a petition for rehearing on behalf of his client within the allotted time and never moved to withdraw from representing him. Jackson's execution was set for August 21, 1996.

P 3. On August 6, 1996, another attorney, C. Jackson Williams, [FN1] filed on behalf of Jackson, in this Court, an Entry of Appearance as Jackson's attorney, Motion for Stay of Execution and Application for Leave to File Out of Time Petition for Rehearing and/or for Recall of the Mandate. Jackson's execution was stayed by this Court and the petition for rehearing was filed, considered and denied. A petition for writ of certiorari was filed in the United States Supreme Court March 5 1997, and denied May 12, 1997. Jackson's execution was then reset by this Court for, and was stayed by the United States District Court on. Williams filed Jackson's Application for Post-Conviction Relief in this Court on May 8, 1998.

P 4. Williams has now filed in this Court on behalf of Jackson a Motion for Appointment of Counsel and Payment of Reasonable Litigation Expenses. Williams states that he has raised in the Application issues "that require paid expert assistance and investigation in order to be adequately addressed" and that if supplied with funds he would hire a forensic psychologist or psychiatrist to review the mental evaluations performed on Jackson before his trial to determine whether insanity was a viable defense, which could lead to a claim of ineffective assistance of counsel. See

Jackson, 684 So.2d at 1226 (Jackson abandoned insanity defense during guilt phase of trial). Williams finally asks that this Court "appoint, compensate, and pay reasonable litigation expenses of the undersigned, including the expenses of a forensic psychologist and a forensic psychiatrist, to prepare and file a petition for Post-Conviction Relief on his behalf." This Court ordered that the State respond to the motion, and that response has been filed and considered. We find that Jackson's motion should be granted.

II.

P 5. A judgment of conviction and sentence of death shall be subject to automatic review by this Court. See Miss.Code Ann. § 99-19-101(4)(1994); § 99-19-105 (Supp.1997). The Constitution of Mississippi requires appointment of counsel pursuant to that automatic review. See also Miss.Code Ann. § 99-15-15 (1994). Where the conviction and sentence of death are affirmed by this Court, the appellant may then file a petition for writ of certiorari with the United States Supreme Court to have it review the conviction and sentence.

P 6. Assuming relief is sought and denied in the United States Supreme Court, the appellant may then apply to this Court for relief under the Uniform Post-Conviction Collateral Relief Act, Miss.Code Ann. § 99-39-1 to -29 (1994)("UPCCRA"). The purpose of the Act is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures, to resolve any conflicts therein and to provide the courts of this state with an exclusive and uniform procedure for the collateral review of convictions and sentences. Specifically, this chapter repeals the statutory writ of error coram nobis, supersedes Rule 8.07 of the Mississippi Uniform Criminal Rules of Circuit Court Practice and abolishes the common law writs relating to post-conviction collateral relief,

including by way of illustration but not limitation, error coram nobis, error coram vobis, and post-conviction habeas corpus, as well as statutory post-conviction habeas corpus. The relief formerly accorded by such writs may be obtained by an appropriate motion under this chapter. Miss.Code Ann. § 99-39-3(1)(1994). The Act provides "a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal." Miss.Code Ann. § 99-39-3(2)(1994).

P 7. Where a conviction and sentence have been appealed to this Court and affirmed, or the appeal dismissed, an application under the UPCCRA must be filed in this Court. Miss.Code Ann. § 99-39-7 (1994). This Court may grant or deny any or all relief requested in the application or allow the filing of the motion in the trial court. § 99-39-27(7)(a) & (b)(Supp.1997). The trial court then reviews the motion and any response and determines if the motion should be dismissed or if an evidentiary hearing should be held. Miss.Code Ann. § 99-39-19(1)(1994). "If an evidentiary hearing is required the judge may appoint counsel for a petitioner who qualifies for the appointment of counsel under section 99-15-15, Mississippi Code of 1972." Miss.Code Ann. § 99-39-23(1)(1994)(emphasis added). Nothing in the UPCCRA requires that one seeking relief be furnished counsel, either at the trial level or on appeal. See also Harris v. State, 704 So.2d 1286 (Miss.1997)(defendant not entitled to appointed counsel on further discretionary review after direct appeal decided by Court of Appeals).

P 8. The writ of habeas corpus has been a hallmark in the protection of our individual freedoms since being brought to this country by our forefathers from England. It is a civil action brought to test the legalities of confinement and to enforce the civil right of personal liberty. The writ is usually brought by a person who is the subject of a criminal prosecution to enforce his right of liberty. In following the

tradition of habeas corpus practice, the Legislature further stated that an application for post-conviction relief "shall be filed as an original civil action in the trial court, except in cases in which the prisoner's conviction and sentence have been appealed to the supreme court of Mississippi and there affirmed or the appeal dismissed." Miss.Code Ann. § 99-39-7(1994). Though this Court treats this statutory classification with respect, it is obvious that actions under the UPCCRA, which collaterally attack criminal convictions, are a unique kind of civil action. See Johnson v. State, 623 So.2d 265 (Miss.1993)(claimant appealing from denial of post-conviction relief may proceed in forma pauperis in contrast to other civil appeals). The reality is that post-conviction efforts, though collateral, have become an appendage, or part, of the death penalty appeal process at the state level. The importance of state post-conviction remedies is heightened by the requirement that, with few exceptions, state remedies must be exhausted before relief can be sought through federal habeas corpus. See 28 U.S.C. § 2254(b) (1994); Coleman v. Thompson, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

P 9. Certain issues must often be deferred until the post-conviction stage, such as the claim of ineffective assistance of counsel. Our practice has been, in recent appeals, to deny appellate counsel leave to withdraw from capital cases which have reached the post-conviction stage unless the appellant agrees to proceed pro se or substitute counsel may be found. Obtaining qualified substitute counsel willing to proceed pro bono on this type of specialized, complex and time-consuming litigation is almost impossible. This practice ignores the reality that the state post-conviction stage is particularly important in capital cases, and that having the same counsel represent the condemned in appellate proceedings and post-conviction actions prevents counsel from raising the claim of ineffective assistance of trial or appellate counsel at the post-conviction stage. This

practice also ignores the reality that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of the UPCCRA. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.

P 10. Though not a criminal case, the United States Supreme Court has recognized that this Court could not deny access to the state appeal process because of lack of funds where a fundamental right was involved in civil litigation. In M.L.B. v. S.L.J., 519 U.S. 102, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996), the Supreme Court found that this Court could not dismiss an appeal due to the appellant's failure to pay the appeal costs in a civil case where the issue at stake was termination of the appellant's parental rights. "[W]e place decrees forever terminating parental rights in the category of cases in which the State may not 'bolt the door to equal justice.' " M.L.B., 117 S.Ct. at 568. Access to equal justice is an even greater interest where the State seeks to impose the penalty of death.

P 11. In Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989), Chief Justice Rehnquist, joined by three other justices, found that there was no constitutional right to counsel, provided by the state, in post-conviction proceedings. Justice Kennedy concurred in the judgment, saying that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for post-conviction relief. I am not prepared to say that this scheme violates the Constitution." Murray, 492 U.S. at 14-15, 109

S.Ct. 2765. In Mississippi, repeatedly, since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers. The Legislature has been aware of this acute problem. In the 1998 session, it took the first step toward the institution of a statewide public defender system. It is strongly urged that the Legislature proceed toward a solution to this serious problem by enacting the program utilized in Virginia or some other system. We can no longer sit idly by. We therefore grant the motion.

III.

P 12. In summary, we find that Henry Curtis Jackson, Jr., as an indigent, is deprived of assistance of counsel and access to the court system in his attempt to obtain state post-conviction relief from his conviction and sentence. We further find that in capital cases, state post-conviction efforts, though collateral, have become part of the death penalty appeal process at the state level. We therefore find that Jackson, as a death row inmate, is entitled to appointed and compensated counsel to represent him in his state post-conviction efforts. This matter is remanded to the Leflore County Circuit Court for appointment of counsel for Jackson and consideration of reasonable litigation expenses. Whether appointed counsel may receive litigation expenses in part to hire a forensic psychiatrist or psychologist depends on the nature of the request, and rests in the discretion of the circuit court.

P 13. MOTION FOR APPOINTMENT OF COUNSEL AND PAYMENT OF REASONABLE LITIGATION EXPENSES GRANTED. REMANDED TO THE LEFLORE COUNTY CIRCUIT COURT FOR APPOINTMENT OF COUNSEL FOR HENRY CURTIS JACKSON, JR., AND CONSIDERATION OF REASONABLE LITIGATION EXPENSES.

PRATHER, C.J., SULLIVAN and PITTMAN, P.JJ., and BANKS, J., CONCUR.

MILLS, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY JAMES L.ROBERTS, Jr., and WALLER, JJ. SMITH, J., NOT PARTICIPATING.

MILLS, Justice, specially concurring:

P 14. Representation by counsel in pre-conviction capital proceedings is a fundamental right of the accused guaranteed by this nation's constitutional jurisprudence. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). This right has not been extended to post-conviction relief proceedings. See Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989). The majority errs by stating, without authority, that such a right is found in the Mississippi Constitution of 1890. A right to counsel in post-conviction relief proceedings can be found in neither the Eighth Amendment of the United States Constitution nor the Due Process clauses of the Federal or State Constitutions. Such a post-trial right is constitutionally nonexistent and beyond our judicial ken to legislate on this matter. However, Miss.Code Ann. § 99-15-15 (1994) requires that " ... such representation [is] available at every critical stage of the proceeding against him where a substantial right may be affected." Though the statute does not define the term "critical", layman's logic dictates the conclusion that proceedings to test the validity vel non of trial court orders of execution are critical. I would find simply that post-conviction proceedings undertaken pursuant to Miss.Code Ann. § 99-39-5 constitute a critical stage in the proceedings in capital felony cases and therefore counsel should be provided.

P 15. I would limit the majority opinion to the issue before us, that being whether an indigent defendant on death

row is entitled to counsel when filing post conviction relief actions. I would find this to be a critical stage of the proceedings and would require appointment of counsel, whether paid for by the county or the state, before further actions could be taken. I therefore specially concur.

JAMES L. ROBERTS, Jr., and WALLER, JJ., JOIN THIS OPINION.

FN1. By order dated July 1, 1997, Williams was appointed by the United States District Court for the Northern District of Mississippi (Western Division) to represent Jackson in his petition for habeas corpus pursuant to 28 U.S.C. § 2254, only for the purpose of the federal appeal.

Williams also filed Jackson's petition for certiorari with the United States Supreme Court. Johnny Walls, Jackson's trial and appellate attorney, has never filed a motion to withdraw; pursuant to our decision in Harris v. State, 704 So.2d 1286 (1997), his representation was effectively terminated when the decision was handed down.

END OF DOCUMENT

IN THE SUPERIOR COURT
FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

EXZAVIOUS GIBSON,	)	
	)	
PETITONER,	)	
	)	CIVIL ACTION
VERSUS	)	FILE NO.: 95-V-648
	)	
	)	
TONY TURPIN,	)	
	)	
RESPONDENT.	)	

- - -

HABEAS CORPUS HEARING

held before the Honorable J. Carlisle Overstreet

taken by Nancy S. Staulcup, Official Court Reporter

on September 12, 1996, commencing at 10:00 a.m.

at the Jackson State Prison, Jackson, Georgia

- - -

APPEARANCES

ON BEHALF OF MR. GIBSON:

PRO SE

AMICUS CURIAE:

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PROCEEDINGS

THE COURT: Okay. Are you Mr. Gibson?

MR. GIBSON: Yes, sir.

THE COURT: Mr. Gibson, I'm going to ask you, if you would, to speak up because the court reporter is going to have to take everything down we say. My name is Carlisle Overstreet. I'm a Superior Court judge down in Augusta, Georgia in the Augusta Circuit. I was assigned to hear this habeas petition pursuant to the rules set by the Supreme Court and the Council of Superior Court Judges. I'm here today to do that.

Are you represented by counsel?

MR. GIBSON: No, sir.

THE COURT: And you are Ms. Whitaker?

MS. WHITAKER: Yes, sir, that's correct.

THE COURT: And you represent the State?

MS. WHITAKER: Yes, sir, I represent Warden Turpin.

THE COURT: Give me a second and let me look at the file. Ms. Whitaker, I have looked at the petition, of course, the attachment is on the forms that are provided. Does the State have any objection to the petition as to its form?

MS. WHITAKER: No, sir.

THE COURT: Mr. Gibson, as you are aware this is classified as a civil proceeding. Consequently, you have a right to counsel if you want it. If you do not have counsel, the Court does not employ counsel for you. Are you aware of that?

MR. GIBSON: I don't have an attorney.

THE COURT: Okay, sir. I understand that. My understanding is that even though he has filed the petition, the burden is basically upon the State. Is that correct, Ms. Whitaker?

MS. WHITAKER: Your Honor, the burden is on the Petitioner, actually, to show a violation of his constitutional rights.

THE COURT: He has filed the petition. I think that is what he has alleged in his Petition; is that correct?

MS. WHITAKER: Yes, sir.

THE COURT: Okay. Mr. Gibson, do you want to proceed?

MR. GIBSON: I don't have an attorney.

THE COURT: I understand that.

MR. GIBSON: I am not waiving any rights.

THE COURT: I understand that. Do you have any evidence you want to put up?

MR. GIBSON: I don't know what to plead.

THE COURT: Huh?

MR. GIBSON: I don't know what to plead.

THE COURT: I am not asking you to plead to anything, I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

MR. GIBSON: But, I don't have an attorney.

THE COURT: Yes, sir. Do you have anything you want to tell this Court?

MS. WELLS: Your Honor.

MR. GIBSON: I don't waive any rights.

THE COURT: Yes, ma'am.

MS. WELLS: My name is Elizabeth Wells. I have filed a number of motions in this Court as Amicus Curiae. If I could be heard for a moment.

THE COURT: No, ma'am, have a seat. Mr. Gibson, do you have anything you want to tell this Court?

MR. GIBSON: I don't waive any rights.

THE COURT: Ms. Wells, I have received all of your motions. I have ruled on all of your motions, I believe haven't we?

MS. WHITAKER: Yes, sir, that's correct, as far as I know.

MS. WELLS: Your Honor, I certainly haven't received copies of rulings on a number of those motions.

THE COURT: maybe you ought to check with the clerk. Have you done that?

MS. WELLS: Yes, Your Honor, I have not seen rulings on certainly the last four filed, the last three filed on August 19th. I have seen an entry of an Order for Scheduling Order, is that considered a ruling on these motions?

THE COURT: Yes, ma'am. I think it is. Based upon -- Mr. Gibson, I will be glad to listen to anything you want to tell me, anything you want to say. I judge you have nothing you want to say or nothing you want to tell me. Is that correct? Except what is in your petition.

MR. GIBSON: I don't have an attorney.

THE COURT: I know that. I can see that. Does the State want to tell me anything?

MS. WHITAKER: Your Honor, as I am sure you are aware, and you have stated. There is no right to counsel in a habeas corpus proceeding. But the United States Supreme Court and the Georgia Supreme Court have held that in Pennsylvania v. Finley, 41 U.S. 551 and Stephens Valkcom, that's S-T-E-P-H-E-N-S, V-A-L-K-C-0-M, at 245 Georgia 492 and most recently, the Georgia Supreme Court has reaffirmed that recognition in Davis v. Thomas, a death penalty habeas corpus case at 266 Georgia 835. As the Court is also aware, the Resource Center filed a petition on

Mr. Gibson's behalf in this case and have, as is well noted, filed numerous motions in the case, already. It is the State's position or belief that this is most likely a ploy for an appeal from this habeas corpus proceeding as the pleadings so far filed by the Resource Center as Amicus counsel have threatened that type of an appeal is Petitioner proceeds pro se, but since the State of the law is that he is not entitled to counsel, we are ready to go forward.

THE COURT: All right.

MS. WELLS: Your Honor, those allegations are simply not true.

THE COURT: Ms. Wells, Ms. Wells, Ms. Wells.

MS. WELLS: Yes, Your Honor. I recognize --

THE COURT: Just a minute, please. Just a minute. Would you like to represent Mr. Gibson?

MS. WELLS: Your Honor. If Your Honor is --

THE COURT: Just answer --

MS. WELLS: I'm answering your question.

THE COURT: Just answer yes or no.

MS. WELLS: If you will give us time, the answer is yes.

THE COURT: Do you want to make an appearance for Mr. Gibson?

MS. WELLS: Your Honor --

THE COURT: Let me tell you what's wrong with what you have done.

MS. WELLS: I recognize --

THE COURT: You know, I've been on vacation. I think Ms. Whitaker has been on vacation. You've been on vacation. Mr. Gibson has been in jail. You have had ample opportunity to do anything you wanted to do in this case and have failed to do that. Now, I am not so sure that you are --

are you capable of representing him, if you handle it the way that you have handled it so far.

MS. WELLS: Your Honor --

THE COURT: I have some great concern about that.

MS. WELLS: With our caseload, we are presently not capable of representing Mr. Gibson.

THE COURT: Well, then --

MS. WELLS: We would do it in a heart beat, if we could.

THE COURT: You've had four years to do it.

MS. WELLS: Your Honor, we have requested, over and over and over, to be heard on this and Your Honor has not granted us even an opportunity to be heard on this.

THE COURT: I've read all of your -- what are you going to tell me different than is in your pleadings?

MS. WELLS: Your Honor, I'm going to try to make you see that this is -- that nobody has ever proceeded in a modern death penalty in Georgia without counsel.

THE COURT: I understand that.

MS. WELLS: That this is ridiculous. That Mr. Gibson has a right --

THE COURT: Why didn't you --

MS. WELLS: -- to a writ of a habeas corpus.

THE COURT: You've had four years to represent him. Why didn't you get in here and represent him?

MS. WELLS: We have not had four years to represent him. That's just absolutely ludicrous, Your Honor. That's certainly -- and the records will support that.

THE COURT: You've been in this case. You've had time to go to Europe, haven't you?

MS. WELLS: Absolutely, Your Honor, and --

THE COURT: And yet you didn't have time to represent Mr. Gibson.

MS. WELLS: I don't think those two weeks would have made a difference in whether or not Mr. Gibson's case was properly prepared.

THE COURT: That's --

MS. WELLS: I've worked on this -- if you want to talk about my personal life --

THE COURT: No, I don't want to talk about it, I'm just saying --

MS. WELLS: You apparently do.

THE COURT: I think if you would have put the time on the case maybe you could have represented him, but I have some serious concern that if you think it is more important to do that than to take up this case, whether you could adequately represent him or not.

MS. WELLS: I have worked fourteen hours days for the last two weeks. I have worked almost every weekend since last September, 1995. This is ludicrous to find that because I went to England for two weeks I am waiving Mr. Gibson's right to an attorney.

THE COURT: No, all I am saying

MS. WELLS: He --

THE COURT: All I am saying to you, is that if it is so important for him to have -- that you can't -- for you to get him a lawyer, why didn't you stay here and try to do that?

MS. WELLS: Your Honor, I have attorneys. I have told the Court there are attorneys lined up who will take Mr. Gibson's case if Your Honor will allow him an opportunity to meet with Your Honor and discuss a Scheduling Order prior to the entry of appearance. These attorneys cannot afford to enter an appearance and be ordered to file something within a month.

THE COURT: What does the State want to tell me?

MS. WHITAKER: Your Honor, I would add that under the Uniform Superior Court Rule adopted by the Georgia Supreme Court in January of this year and passed in December of this year, in which the Respondent again believes, was what prompted the filing of this petition in the first place. The time lines provided are that an evidentiary hearing should be held within six months of the filing of the petition. The petition was filed in December of 1995, and as the Court is aware, it has already been nine months, so any, any protestations from the Resource Center that they have not had sufficient time given the case was final in 1992, we believe are inaccuracies at this point.

MS. WELLS: Your Honor, as the State has conceded, this was filed prior to the Rule 44. It's not -- Rule 44 does not dictate the scheduling guidelines in this case. The Georgia Constitution allows Mr. Gibson the writ of habeas corpus, a guaranteed --

THE COURT: Please, Ms. Wells. Ms. Wells, don't repeat anything you've already told me in all of these briefs you've filed. Okay? I mean, I've read them all. I've been through it.

MS. WELLS: Your Honor, this is a complete denial of due process. This is making a mockery of the system.

THE COURT: You've argued that point. You've argued that point.

MS. WELLS: Your Honor, I submit if you would have allowed the hearing back when we filed the first Amicus motion, we may be proceeding on this. We cannot -- we are understaffed. We have two attorneys at the Georgia Resource Center who can enter into State Court.

THE COURT: Well, the record reflects what times have been spent doing what. It reflects the time that the petition has been filed; how long everything has been pending. Ms. Wells, in all due respect, the thing has had adequate time to be thoroughly investigated and reviewed, if you wanted to do that.

MS. WELLS: Your Honor, that is simply not true.

THE COURT: With all due respect.

Ms. WELLS: That is simply not true.

THE COURT: Well, then what do you think is a good time -- years?

MS. WELLS: No, Your Honor, I will tell you what. Various courts -- there were thirteen pro se petitions there were thirteen inmates proceeding pro se in January of this year. Various courts have allowed counsel on them. They have had scheduling orders. One Judge allowed nine months; one Judge allowed six months. The Resource Center has been willing to meet with these Courts to attempt to find counsel or to enter an appearance. We have repeatedly told the Court that that's our desire to do so in Mr. Gibson's case. We don't think that the system benefits by having this inmate go through without counsel. We think that it makes a mockery of the system. We --

THE COURT: Didn't I ask you yesterday, didn't I ask you yesterday on the telephone, did you want to represent him?

MS. WELLS: Your Honor, and I have told you --

THE COURT: And what did you tell me?

MS. WELLS: -- we will represent him with time.

THE COURT: Yes.

MS. WELLS: I said with adequate time --

THE COURT: Well, let me ask you this, did I ask you that back when you first filed your amicus brief, did you want to represent him?

MS. WELLS: No, Your Honor.

THE COURT: What did you tell me then?

MS. WELLS: No, Your Honor, you did not tell me that.

THE COURT: Well, what have you told me in your briefs?

MS. WELLS: I have asked -- I have requested time so we can come on to represent this client. I have requested repeatedly that we be allowed time to represent this inmate adequately. We are bound by ethical rules to competently represent someone.

THE COURT: Do you want to step up here and have a seat next to him as his lawyer?

MS. WELLS: Your Honor, if you will give time. I mean it is ludicrous to expect a hearing to go forth.

THE COURT: Ms. Wells, Ms. Wells.

MS. WELLS: I haven't read the record in this case. I know nothing about this case.

THE COURT: Ms. Wells, Ms. Wells.

MS. WELLS: Yes, Your Honor.

THE COURT: Do you want to represent him? I am not going to tell you what I am going do, but if you want to represent him, sit down in the chair, make an appearance in this Court or please be seated.

MS. WELLS: Your Honor, you know I want to represent him, I have said it every way I can say it. To sit down here and have the Court say, conduct the hearing when I have never spoken with Mr. Mullis, I have never read the record. I know nothing about this case. That would make a mockery of it. Your Honor, I think --

THE COURT: You have filed a lot of papers not to have read the file.

MS. WELLS: Those papers do nothing but recite the history of the death penalty and what's going on and what our attempts are to find counsel.

THE COURT: I will give you the opportunity right now to have a seat with him as his lawyer or please sit down.

MS. WELLS: Your Honor, I, just to put on the record that I would like to enter an appearance, but I cannot

do so without the Court discussing what the scheduling limitations are going to be.

THE COURT: I am not going to make any deals, Ms. Wells. If you want to represent him, have a seat. If not, sit down.

MS. WELLS: Well, Your Honor, this is a complete denial of Mr. Gibson's rights.

THE COURT: Come up here and help him.

MS. WELLS: Help him what? Help this Court deny him all of his rights?

THE COURT: Don't sit -- all you have done is sit outside the bar and throw stones.

MS. WELLS: Your Honor --

THE COURT: Get inside the bar and do something.

MS. WELLS: Your Honor, the record will show that we have entered appearances on a number cases; that we have found counsel on a number of cases.

THE COURT: Well, I am not in those cases, Ms. Wells, and all I have gotten is stones thrown, and all I am saying is either come up here and represent him, you are welcome come and sit down and represent him, and we will proceed and I will listen to your motions, and I am not going to tell you how I am going to rule on them. I am not going to predecide the case. But if you want to represent him, have a seat. If not, please sit down, and let me go forward.

MS. WELLS: Your Honor, I don't understand why we can't just discuss what a scheduling order would be prior to that. I certainly have no confidence that we won't have to proceed with the hearing today. I can't enter --

THE COURT: Well, let me ask you this --

MS. WELLS: I cannot competently --

THE COURT: If I sit down and discuss the scheduling order and you don't like it then, you ain't going to do anything so, I mean, if you want to represent him, I'll say

it again, have a seat next to him, make an appearance or, please, let me go forward.

MS. WELLS: Your Honor, this is a mockery of justice.

THE COURT: You have told me that.

MS. WELLS: Yes, Your Honor, well, I just don't think you are aware of that.

THE COURT: I am very aware of what --

MS. WELLS: This is ridiculous. Mr. Gibson may as well be hung up from a tree out back. This is just ridiculous.

THE COURT: I judge you are not going to represent him, is that correct?

MS. WELLS: Your Honor, I will enter an entry of appearance if Your Honor will discuss a scheduling order. I simply cannot do it.

THE COURT: I am not going to take --

MS. WELLS: I mean, I am supposed to be in another court.

THE COURT: It would not be fair. It would not be fair to Mr. Gibson to have your make a conditional appearance with him. If this man needs a lawyer, if you think he needs a lawyer, be his lawyer. If you don't, don't, don't say, I am only going to represent him. If he needs a lawyer so bad, don't tell him you are going to represent him only if he does certain things, only if the Courts do certain things. It is not fair to him. Either get in the case or get out.

MS. WELLS: Your Honor, it is not fair to him to come on a case and not be given an opportunity to investigate and present his issues.

THE COURT: It is better than to have some lawyer get in the case and then turn around and desert him, because they don't get what they want.

MS. WELLS: Your Honor, I am not talking about turning around and deserting him. I am talking about not

coming on the case until we-discuss whether or not there is adequate time to investigate and present this case.

THE COURT: I understand your position, and I will again offer you the opportunity to come up here and represent him or please have a seat and let me proceed.

MS. WELLS: Well, Your Honor, I would respectfully submit that that is an empty offer.

THE COURT: Okay. Thank you. Okay. Anything else on behalf of Mr. Gibson? Anything else Mr. Gibson wants to tell me after that conversation?

MR. GIBSON: No, sir.

THE COURT: Okay. Ms. Whitaker, is there anything else you want to tell me? Do you want to proceed?

MS. WHITAKER: Yes, sir, I am ready to proceed. And, Your Honor, initially, I will call Dennis Mullis to the stand.

THE COURT: All right. Come on up, Mr. Mullis. Will your raise your right hand, please, sir? Do you solemnly swear the testimony and evidence you shall give this Court on issues pending, will be truth, the whole truth, so help you God?

MR. MULLIS: I do.

THE COURT: Thank you very much, Mr. Mullis. Have a seat.

MS. WELLS: Your Honor, I apologize for interrupting.

THE COURT: Yes ma'am.

MS. WELLS: Mr. Gibson was not even allowed an ink pen.

THE COURT: Any what?

MS. WELLS: He was not even allowed an ink pen.

THE COURT: Okay. I think we can handle that.

MS. WELLS: This man who is expected to be able to --

MS. WHITAKER: Your Honor, if I may, I will provide Mr. Gibson with an legal pad and a pen.

THE COURT: Thank you. Thank you very much. Go ahead, Ms. Whitaker.

DENNIS MULLLIS

having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. WHITAKER:

Q. Mr. Mullis, will you please state your full name for the record?

A. William Dennis Mullis, M-U-L-L-I-S.

Q. Mr. Mullis, what do you do for a living?

A. I am an attorney at law.

Q. And when were you first admitted to practice in Georgia?

A. 1979.

Q. And have you been practicing since that time?

A. I have.

Q. And were you the trial attorney in Mr. Gibson's case?

A. Yes.

Q. Death penalty case?

A. Yes.

Q. Were you also the appellate attorney in his case.

A. Yes.

Q. And did you represent Mr. Gibson at that time in your capacity as a public defender?

A. I did.

Q. And for how many years were you the public defender?

A. Oh, I loose track. I would say that I was public defender for twelve years, I believe, plus or minus.

Q. And are you now in private practice?

A. Yes, I was in private practice at the time that I represented Mr. Gibson.

Q. I am sorry, I had thought that you said you were the appointed public defender at that time?

A. I was. We had a contract or I had -- initially my partner and I had a contract to handle the public defense, indigent defense, for a three county area beginning in the early 1980's, and as I became a solo practitioner, I continued that contract up until 1992, if my memory serves me correctly. And I was in private practice simultaneously.

Q. Now, in your practice prior to the time that you became the contract public defender for the three counties in the circuit that you mentioned, what was the nature of your practice before that time?

A. General private practice. Well, we are only talking about a couple of years, you understand, before I became public defender.

Q. All right. And at the time of your appointment in this case, what was the primary nature of your practice?

A. General practice of law in a small town.

Q. Did you have any particular concentration at that time?

A. No, not really.

Q. All right. What was your background in criminal law at that time?

A. At what time?

Q. At the time that your represented Mr. Gibson?

A. I had, by that point in time, I had handled scores if not hundreds of felonies, misdemeanors of every type and description, that you normally see in a Superior Court setting; two death penalty cases prior to Mr. Gibson's.

Q. And, if you recall, what were those two death penalty cases?

A. Mr. Eli Beck was one defendant and the other was Mr. John Connor; Connor was first actually.

Q. All right. And what was the outcome of the Connor case?

A. Connor received the death sentence.

Q. And the outcome of the Beck case?

A. Beck received a death sentence, initially, at the first trial; was reversed -- the sentencing phase was reversed on appeal. He was tried a second time and received the death penalty again. Subsequently, after my representation, within the last five or six years, the issue of retardation became a issue in this case, and he was allowed to enter an arrangement whereby he received a life sentence.

Q. So when the case was reversed on appeal after the first trial, were you the appellate attorney at that time, too?

A. Throughout, yes, throughout.

Q. Did you find that your previous handling of the two death penalty cases that you have mentioned had any impact on your representation of Mr. Gibson in this case?

A. Well, I think in most every case in life, experience helps. Yes.

Q. All right. And did you do any particular research into death penalty law in preparation for Mr. Gibson's trial?

A. I'm certain that I did.

Q. Do you recall at approximately what stage in the proceedings that you were appointed to represent Mr. Gibson?

A. I can check the dates, if you like, but to the best of my recollection, it was within days of his arrest.

Q. All right. Would the appointment time that you have submitted on your affidavit for payment to the County have reflected the approximate time of your representation, of your appointment?

A. I would think so. I, you know, you are talking about appointment and sometimes appointment comes actually after I have actually first seen the defendant or it might come after I opened my file, you understand.

Q. So you might begin work on the case before you are formally appointed by the Court; is that what you're saying?

A. Correct. When I was public defender, if I got word that we had a major felony in my area, I would beat a path to the jail and see the defendant.

Q. And you believe that may be what happened in this case?

A. I am sure it did.

Q. Now, do you recall approximately how many meetings you had with your client over the course of his representation, your representation of him?

A. No, I do not, there were many, many meetings. He was held, I remember, in the jail in the city jail in Eastman and I can't recall if he ultimately ended up in the county jail or not, but I remember going to see him in the city jail on many occasions.

Q. All right. Now, during those meetings with Mr. Gibson did you have any -- let me rephrase that. What was your impression of his ability to assist you in the case and in his; defense?

A. I felt that Exzavious was quite rational in all of my dealings with him. He was cooperative. Actually, he was not from the Dodge County area and he actually seemed to have, to me, a little bit better education than the typical defendant that I was accustomed to. I always found him to be rational and very helpful to the extent that he could be in his case.

Q. Was he able to discuss with you the facts of the case?

A. Yes.

Q. Was he able to discuss the State's evidence as you all found it?

A. Yes.

Q. And was he able to provide you with any defense witnesses or potential defense witnesses?

A. I remember, not so much in the guilt-innocence phase, but in the mitigation phase, yes, he gave me the names of family members that he felt might be of some assistance or acquaintances.

Q. Now, was there an open file in this case?

A. So far as I know. You know, I --

Q. Let me -- was there an open file policy in this case?

A. To my knowledge, there was. I went to the District Attorney's office and examined the file and examined the GBI file in the case.

Q. And the record reflects that there was an in camera inspection in this case. Was that the typical practice of your circuit in death penalty cases?

A. Certainly.

Q. Did you find the District Attorney's office to be cooperative in providing you information from their file?

A. Yes, yes, as far as I know, again, you know, if it is not there, I would have no way of knowing about it,

unless it come to me from some outside source, but I -- nothing developed during the course of the trial that came as a surprise to me.

Q. Did you file any Brady or discovery type motions in addition to the fact that you had an open file policy with the District Attorney's office in this case?

A. Yes, I did.

Q. And do you recall what those motions were?

A. Well, a Brady motion, of course, and request for scientific reports. This was before the more recent discovery, criminal discovery statute, which I would very much like to have had when I was public defender. That's all I can recall from the top of my head, although I am confident that I did.

Q. Did you receive any discovery as a result of the motions you had filed?

A. Do you mean from the trial court after an in camera inspection?

Q. Either that or from the District Attorney's office?

A. I don't recall anything from the trial court. That would be in the record. I know, I am not aware of receiving anything that was potentially exculpatory, if that's what you mean.

Q. Did you receive the crime lab report in this case and any supplements?

A. I am sure I did.

Q. All right. Do you recall whether you received witness lists?

A. Yes.

Q. And did you receive supplemental witness lists as they were produced?

A. I am sure I did.

Q. All right. Do you recall whether you reviewed any witness statements taken by the District Attorney's office or law enforcement in your review of the D.A.'s files?

A. Again, I read the Georgia Bureau of Investigation report which contained a number of witness statements.

Q. All right. Do you recall whether you interviewed any of the State's witnesses on your own?

A. I recall speaking to some of the law enforcement personnel. And I talked to a young lady who had, I believe, had allegedly seen Mr. Gibson or someone matching his description leaving the scene of-where the homicide occurred. That stands out in my mind.

Q. Would that have been Vickie Jackson that you are referring to, the woman who testified at the motion to suppress hearing?

A. I believe that's right. I, also, spoke to a Kirkpatrick or a Kilpatrick lady, who had perhaps seen Gibson earlier in the day or something. It has been a while.

Q. Can you briefly review for the Court's benefit what the State's evidence showed in this case?

A. Well, the evidence showed that the victim operated a small, privately owned convenience store, there in the city limits of Eastman, and, I believe someone came, a customer came to the store and entered and found it in a state of disarray and found the operator's body behind the counter and blood everywhere.

Law enforcement, I don't believe that -- they were ultimately called, but as it turned out, I believe, the chief of police just happened to be driving by as a number of people converged on the premises and came in and, of course, sealed off the scene. Another witness approached the law enforcement officer and said that she had seen someone that she described leaving the scene shortly before and

appearing to look over his shoulder as if he was very nervous or concerned about what was behind him, and she described this individual and told them where he was staying. The officer went to that location, all of this taking place within minutes of the homicide. The officer went to the location, knocked on the door, the elderly lady that lived there said come in. The officer stepped into the front the room and saw what appeared to be droplets of blood leading to the back room in the house. And, he, the officer said something to the lady to the effect of where's your grandson or is your grandson here, and she said he's in the back room, what's happened, has he robbed somebody or something? And the officer went to the back room. I believe he testified that he observed what appeared to be bloody money or some bloody objects sticking out from under the bedspread. He lifted up the bedspread and found money and a knife, I think. I think, there was a knife found at the scene there. The officer began to look about and couldn't see anybody and observed a closet door -- a closet, closet door. Went over and without calling backup opened the closet door and there was Mr. Gibson and he told Mr. Gibson to come out and he was arrested without any struggle as far as I know.

Q. Did the State's evidence show that there was any description of the person seen leaving the scene which would have matched your client's description?

A. Yes.

Q. Okay. Do you recall what that evidence was, more particularly?

A. Again, I just, in fact, generally, I believe the lady, young lady testified that she had seen a man, with, I can't really remember the combination, it was like blue shorts and a white shirt or blue shirt and white shorts, something to that effect. And she knew enough about this individual to be able to tell -- to direct them to the house where Mr. Gibson was staying at the time.

Q. And was the clothing that was found at the house, did that in any way tie your client to the crime scene?

A. I honestly don't recall.

Q. All right. Do you recall whether there was any physical evidence tying your client to the crime scene?

A. Well, again, there was all this blood, all over everywhere, that I believe matched the -- the bloody money found there in the very room in which he was located matched the blood type of the alleged victim.

Q. Were there any particular articles of clothing that had left any -- or that matched in any way any evidence left at the crime scene?

A. Might have been some gloves or a sock or something, but I just don't recall.

Q. Have you reviewed the trial transcript in preparation for your testimony here?

A. No.

Q. All right. And when did this trial occur?

A. 1990, I believe.

Q. Okay. Do you recall any tennis shoes being a factor in evidence in the case?

A. I believe there was a footprint. I remember something about some prints. There was a palm print, I recall, that was found on the door jam. There may have been some bloody footprints and then they matched the shoe print to the bloody footprint that was at the scene.

Q. Would the trial transcript be the best evidence of that?

A. It certainly would.

Q. Based on your recollection. All right. Did you discuss what you found from the State's evidence with Mr. Gibson?

A. Yes.

Q. Was Mr. Gibson able to give you a version of the events?

A. Yes.

Q. Did that version of the events inculpate him in the crimes?

MS. WELLS: Your Honor, Mr. Gibson is without legal knowledge to know --

THE COURT: Ms. Wells, Ms. Wells --

MS. WELLS: -- he could object to this.

THE COURT: Ms. Wells, have a seat or either I will ask you -- or I will remove you. Do you understand that?

MS. WELLS: Yes, Your Honor, but this is ludicrous.

THE COURT: Thank you very much.

MS. WELLS: He doesn't have legal counsel.

THE COURT: And please remain quiet. Thank you very much. Go ahead, Ms. Whitaker.

MR. MULLIS: Your Honor, I would have to be relieved of my attorney client privilege, I think, to respond to that, if the Court would advise me. That would be well within the privilege.

MS. WHITAKER: Your Honor, there is case law that establishes that when a defendant or a petitioner makes a claim of ineffective assistance of counsel against his previous attorney that waives any attorney client privilege, and I can find you a case cite.

THE COURT: I am well aware of that law and let me ask Mr. Gibson. Mr. Gibson, do you have any objection to Mr. Mullis testifying to what you told him?

MR. GIBSON: Your Honor, I don't know what to do, I don't have an attorney.

THE COURT: Okay. Okay. Based upon the fact that he has made the claim of ineffective assistance of counsel, I will relieve you of that and grant you that waiver. Go ahead, Mr. --

MS. WHITAKER: Your Honor, just for the record, I'll cite Roberts v. Greenway, 233 Georgia 473.

THE COURT: Thank you very much. Go ahead.

A. The answer to your question is yes.

Q. All right. Had your client given any statements to the police?

A. Yes.

Q. And do you recall --

A. I assume you are speaking of before I talked to him?

Q. At any time.

A. Yes.

Q. All right. And, were those before you spoke with him?

A. Yes.

Q. Were those before you were his appointed counsel in the case?

A. Yes.

Q. All right. I)o you recall at what time period those occurred?

A. I think it was the very day of the homicide.

Q. All right. And did you review those statements with your client?

A. Yes.

Q. Were those statements also inculpatory?

A. Yes.

Q. Were there any inconsistencies, major inconsistencies, between what your client had told police on the day of the crimes and the version of events he gave you?

A. Frankly, no, there were inconsistencies, but -- and differences about motivation, but as far as the gist of it, no.

Q. Was Mr. Gibson able to provide you with any version of events or any information which you felt might have been a potential defense to the crimes?

A. Defense to the guilt-innocence

Q. Yes.

A. -- issue?

Q. Yes.

A. No.

Q. What -- did he provide any motivation or any rationale to the police in his statements for the crimes?

A. I believe his statement to the police was that, that he needed money. He was using crack cocaine and went there to get some money -- the store with an eye toward robbing the victim and that it got out of hand.

Q. In your discussions with Mr. Gibson did he give you any motivation for the crime?

A. More of the same. The same type statement.

Q. All right.

A. He did -- let me back up. At one point he indicated that he had been, and, again, I don't recall the chronology exactly, but he had been in the store earlier on an occasion with a relative or friend and had complained about the price of some product and maybe said -- maybe cursed or used some profanity and the victim said, or someone who was operating the store, I think it was the victim, said something to him like, "hush, don't talk that way in here. If you are going to talk that way in here, get out". And, you

know, there was a little animosity there. And we tried to use that to the extent that we could.

Q. Did you request a charge on voluntary manslaughter?

A. I am sure I did.

Q. Do you recall whether the charge was given?

A. No, I don't.

Q. Did you believe that that was --

A. I believe, let me interrupt. I believe it was.

Q. Do you recall -- was your view of that version of the events that Mr. Gibson provided, did you believe that that was going to be sufficient evidence to establish voluntary manslaughter?

A. My personal opinion?

Q. Yes, as trial attorney and as a defense attorney.

A. I thought it was very unlikely.

Q. Did you

A. But --

Q. I'm sorry.

A. -- I felt like we had to pursue it.

Q. Did you explore any other potential defenses to the guilt innocent-phase in this case?

A. Well, of course, the issue of Mr. Gibson's mental status, his competency bore m the guilt-innocence.

Q. And did that arise in the case?

A. Well, naturally, in a case of this gravity, we requested -- he was examined by the people at Central State Hospital, and we also requested funds for an independent examination to determine his level of intelligence and emotional state.

Q. Was your motion for an independent evaluation, was that following or previous to, at the same time as the Court ordered evaluation, if you recall?

A. I think it -- I feel like it would have been subsequent to the Court ordered evaluation.

Q. Was that motion granted?

A. Yes.

Q. And did an independent evaluation of your client occur?

A. Yes.

Q. All right. And do you recall who the doctor was who provided that evaluation?

A. Dr., I believe, it was George Anderson, I believe is his name. He is out of Dublin. He's a psychologist over there.

Q. And was this a psychologist that you have familiarity with?

A. Yes.

Q. Had you used him in previous cases?

A. I had.

Q. All right. And was there anything of benefit to your client's case in the results of the Court ordered evaluation?

A. I don't recall anything that -- I believe they indicated that Mr. Gibson was in the lower range of normal intelligence or the high range of mental retardation, perhaps. I don't recall -- I don't believe that they categorized him as retarded, but they said that his I.Q. would have been, I believe, in the 80's or high 80's or something of that nature,

Q. Did you receive a copy of the court ordered evaluation?

A. Yes.

MS. WELLS: I would like to have this marked as Respondent's Exhibit 1.

Q. You can take a look at that and tell me whether you recognize that document?

A. This appears to be the letter which was prepared by Dr. Robert J. Storms of Central State Hospital, pursuant to the Court ordered evaluation.

Q. Right. And would you have kept a copy of that in your file?

A. Yes.

Q. Did you review that evaluation?

A. Yes.

Q. Did you contact Dr. Storms at any point prior to the trial in this case to discuss his findings?

A. I did.

Q. All right. And do you recall by what means you communicated with Dr. Storms?

A. Telephone.

Q. And what was the result of your telephone communications with Dr. Storms? Was he able to provide you with any useful information to help your client?

A. I would have to look in my file. I've got a transcript. I believe I taped with his permission, I tape recorded the conversation, I believe. And I think I have a transcript of that.

Q. Did Dr. Anderson provide you with a copy of any written findings based upon his evaluation of your client?

A. He did.

Q. Did you review those findings

A. Yes.

Q. And did you have any discussions with Dr. Anderson about those findings?

A. I did.

Q. And, again, do you recall what the mode of communication with Dr. Anderson was?

A. Telephone.

Q. And was Dr. Anderson able to provide you with anything that you felt would have been beneficial to your client? Any information?

A. Not really.

Q. I hand you what I've marked Respondent's -- this is a document stapled together that I've marked, in sections, Respondent's Exhibit 2-A, 2-B, and 2-C and ask you if you recognize those? And if you could address each of those, whether or not you recognize each of those sub-parts?

A. All right. 2-A appears to be a copy of a cover letter which accompanied Dr. Anderson's written report. The next page is the first part of the report on through, I believe it runs six pages. Then I have -- 2-B is a transcript of a telephone conversation with, between myself and Dr. Anderson of June 2, 1990. And- 2-C is a telephone -- a transcript of a telephone conversation between myself and Dr. Storms of May 15 of '90. I believe that's it.

Q. Do those documents accurately reflect the transcripts that are kept in -- were kept in your defense file in this case?

A. Yes.

Q. Did you discuss with Dr. Storms and Dr. Anderson the possibility of a mental retardation defense in this case?

A. Yes.

Q. And were -- what were their conclusions what was Dr. Storms conclusion with regard to that issue?

A. May I refer to this?

Q. Certainly.

A. Dr. Storms's result you asked about?

Q. Yes.

A. Well, on this written report Storms characterized Mr. Gibson as functioning within the average range of general intelligence. In the telephone conversation I asked him, I said, "Do you have an I.Q. figure?" And he said, "Yes, it is somewhere in the 80's, actually I can't remember." He said, "I wanted to make sure that he was not mentally retarded first of all and he is well out of that range, there is no question". I said, "Even with an I.Q. in the 80's?" and he said, "No, that is still average". That was his, Dr. Storms', response.

Q. All right. Was Dr. Anderson's finding with regard to that issue consistent with Dr. Storms'?

A. I believe so. He gave him a full range I.Q. score of 76, borderline range of intelligence. But in my telephone conversation -- this is always what's so spooky about talking to psychologists. In our telephone conversation, I said, "In your report you described him on a couple of occasions as borderline intelligence. What does that signify to you?" his response was, "Actually he's-brighter than that, but that's how he scored. He just doesn't have any motivation. He didn't act like he cared one way or the other. He's about a half a peg below average. He's certainly not retarded." This is what Dr. Anderson said to me by telephone.

Q. All right. So based on those discussions with the two doctors who had conducted evaluations of your client, did you believe it would be fruitful to pursue a mental competency any further?

A. No.

MS. WHITAKER: Your Honor, at this time, I will show these exhibits to Mr. Gibson and then I will enter them into the record.

THE COURT: Mr. Gibson, do you have any objection to those?

MR. GIBSON: I don't have any attorney. I don't know what to plead.

THE COURT: Pardon?

MR. GIBSON: I don't know what to plead.

THE COURT: Well, I'm just asking you, do you have any problem with those being introduced into evidence?

MR. GIBSON: I don't have an attorney.

THE COURT: Okay. They're admitted.

Q. Mr. Mullis, did you consider the possibility of any type of drug addiction defense in this case to guilt-innocence?

A. I did consider that because Mr. Gibson had related his history of using crack cocaine. However, well, that answers your question.

Q. All right. You did not eventually present any defense based on drugs. Why did you reject that as a defense?

A. Well, we didn't present, I don't know if it is entirely accurate to said that, we certainly presented that, believe, in the mitigation phase, but in the guilt-innocence phase.

Q. Yes, that's what I'd like for you to address at this time, the guilt-innocence.

A. Right. Well, first and foremost, of course, voluntary intoxication is not a defense. Secondly, in my own observation of Mr. Gibson shortly after, days after he was arrested and throughout the trial, first and foremost, I never observed anything consistent with my previous observations in some defendants of drug withdrawal or any sort of organic type of brain damage resulting from alcohol or drug abuse or

anything of that nature. He did not relate any history of treatment for drug abuse that I can recall. There just didn't seem to be any evidence along those lines other than his own anecdotal statements.

Q. Did either Dr. Storms or Dr. Anderson turn up in their evaluation with Mr. Gibson any evidence of a prior drug history?

A. No. Well, I'd want to-take that back. I'd have refer to the written report. I just don't -- they may have said that he related a drug history, but I don't recall that

Q. Any prior institutionalizations for

A. No.

Q. -- drug reasons?

A. No.

Q. Did you review the statements that he had given to the police on the day of the crimes for any evidence of your client being under the influence of drugs?

A. I did. We had the advantage, if you want to call it that, at least as bears on this issue, of having the video taped interview with law enforcement that was made, I believe, the day of the occurrence, late, later in that evening, an interview with the G.B.I. agent interrogation, that's what it was. So I had an opportunity to observe him at that time as well.

Q. Did he appear on that video tape to be under the influence of any drugs?

A. No.

Q. Do you recall whether during that statement that the police questioned him at all about being under the influence of any drugs?

A. I don't recall.

Q. Did you review the first statement?

A. You say the first statement, there was a statement he gave to the Sheriff of Dodge County, I believe,

that I think preceded the statement that was given to the G.B.I.; that's my recollection. I reviewed everything that they made known to us.

Q. Did you see anything in that statement that would have been helpful to any kind of a drug defense?

A. I just, honestly, I don't recall the substance of that statement. I'd have to, you'd have to show it to me.

Q. Was there anything in the discussions that you had with Mr. Gibson other than his anecdotal relating that he had used some crack prior to the crimes that you felt would have been beneficial to some type of a drug defense in the case?

A. No.

MS. WHITAKER: At this time, I would like to review some of the motions that you filed in the case, and, Your Honor, has been previously provided with a copy of the record in the case?

THE COURT: Yes, ma'am.

MS. WHITAKER: We are not going to tender that because that's already in the record of the Supreme Court.

Q. Mr. Mullis, if you will just refer to the record at this point, to the index, and I would like to review your rationale for filing some of the motions which you filed. It appears you filed a motion for in camera inspection and for production of documents, I believe, we've already discussed that issue; would that have been part of your discovery efforts in the case?

A. Yes.

Q. All right. And, likewise, would the demand for list of witnesses and copy of indictment also have been a part of your discovery efforts in the case?

A. Yes.

Q. All right. You also filed a motion for pre-trial hearing to determine the voluntariness of defendant's statement. Is that the motion that you were referring to previously in your testimony, to challenge, your client's statement?

A. I don't recall referring to that, but --

Q. I'm sorry, did you challenge the statements that were given to the police by your client?

A. Certainly.

Q. All right. Would this have been the motion by which you did that?

A. Yes.

Q. Was there a hearing on that motion?

A. I'm sure there was.

Q. Do you recall it in any particularity?

A. No.

Q. Now you filed a motion for a change of venue. Do you recall the circumstances of your-filing of that motion?

A. Well, the victim in the case was a black man who operated, as I said, a small convenience store there in Eastman. Eastman is a small town. I don't know the population for sure, but it's probably maybe 10,000 people. It's a small community and the victim was well-known. As I learned in voir dire, he was even more well-known than I had anticipated. There was some publicity, newspaper coverage, in the community. Some of it I thought was inflammatory, and I think they referred in some article to Exzavious Gibson who killed so and so. This was before the trial, as if it were a foregone conclusion. So, I felt that it was in his interest to request a change of venue.

Q. Did you present evidence in your motion for change --or in -- let me rephrase. Do you know, was there a hearing on your motion for change of venue?

A. Yes.

Q. All right. In that hearing did you present any evidence of pre-trial publicity in the case?

A. I presented what there was, yes.

Q. All right. And was the motion successful?

A. No, I think, as is usually the practice, the Judge sort of denied it for the tire being and deferred final ruling until we had the voir dire, but even after the voir dire, as far as -- I mean, he didn't see it my way.

Q. Had you renewed the motion at the time of voir dire?

A. I think so.

Q. In the voir dire of the potential jurors in this case, did you have -- did you consult with anyone about the potential jurors in the case?

A. Yes.

Q. All right. Did you have any familiarity with the local population?

A. Somewhat, yes, a good deal of my general practice comes out of Dodge County, although I do not practice, I don't have an office in Dodge County, I'm in Bleckley County, but, yes, I know a lot of people there.

Q. In your voir dire of the potential jurors did they appear, in your opinion, to be tainted by pre-trial publicity?

A. You know, I can't recall if any were excused for cause as a result of pre-trial publicity. I remember distinctly that I was somewhat surprised that there were as many whites that knew the victim, if not more, than blacks on the jury panel as a whole and that the number of whites that patronized the store, I was a little surprised by that.

Q. Is it correct that both your client and the victim in this case were black?

A. Yes.

Q. Did you -- was there any Baton type issue present in this case following the voir dire?

A. Not that I recall. I don't remember the ultimate racial composition of the jury, but I certainly don't recall any Batson problem.

Q. All right. Would you have presented such a challenge at that time if there had been one?

A. I am sure I would have. I mean, if, as I said, we were between, in term of picking a jury, we were between a rock and hard place because the victim was black and the number, large number of whites that knew the victim, you know, it kind of, we couldn't, in the popular parlance play, the race card very well.

Q. How did you feel about the jury that was chosen to try the case? Did you feel like that was going to be a jury sympathetic to your client?

A. I can only compare it to other cases that I have tried, and I felt that it was, seemed like they would be a fairly fair jury. You never know what people have heard or who they have talked to. I can't read minds, but they felt, they seemed to be attentive throughout the case and didn't give any visual signs that they had reached any previous conclusion.

Q. Did you file any motions with regard to voir dire as to the death penalty issues in the case?

A. I'm not sure. We filed a request for a reverse Wetherspoon type of question. I don't recall. I think the Judge may have given it, may have used it, I just don't recall. I think we had a juror, a juror questionnaire in this case as well. But I'm, again, not sure of that.

Q. What was the State's evidence in aggravation in this case?

A. Well, of course, it was an armed robbery type situation. The victim and the perpetrator were relative strangers. The victim was cut, I believe, according to the

autopsy staff, some 39 times or cut in various places on his body 39 times. The knife was actually broken off into the vertebra, somewhere in his back or neck. It was, it was just a very bad homicide. And that was the primary aggravation in the case.

Q. Did you review a copy of the autopsy report prior to the trial?

A. Yes.

Q. Did you -- were you able to discuss the autopsy report with the autopsist in the case prior to trial?

A. I do not recall doing that. I really don't. If I did, I don't recall that.

Q. Did you cross examine the autopsist during the guilt-innocence phase of the trial?

A. I know he testified. Whether I asked him any questions, I don't recall. In a case of this nature, cross examining an autopsist can be sort of like cross examining the victim's mother. You have be extremely careful or you can make it worse, and I just don't recall whether I did or not.

Q. You mentioned that a knife wound that had broken off the knife in the victim's body; do you recall that have being of any particular significance in the case?

A. There was some testimony, I believe, from the pathologist or whoever performed the autopsy that he was of the opinion that this would have resulted in paralysis at that instance, and thereafter the victim would have been prone, I believe.

Q. Let me refer you to the examination of the autopsist in this case.

MS. WHITAKER: I believe Your Honor also has a copy of the trial transcript.

THE COURT: I do.

MS. WHITAKER: This will be the testimony of Dr. Chris Berry which begins on page 327 in the transcript.

Q. Mr. Mullis, if you could just review that to determine whether you did cross examine this witness in the case?

A. Yes, I did.

Q. Can you tell from that cross examination whether your had had any prior conversations with Dr. Sperry about his findings?

A. Yes, I said -- I introduced myself to the witness and I said, "I believe I spoke to you by telephone back on May 31; do you recall that?" and his response was "Yes".

Q. Can you determine, reviewing your cross examination further, any significance that the knife wound that you mentioned may have resulted in paralysis prior to death, in the guilt-innocence or the case in aggravation?

A. I asked him if it were possible that the knife wound to the neck where the knife was broken off was the final wound, the last stab that took place, and I got him to admit that in our telephone conversation, he had told me that that was a possibility.

Q. And why would that have been of benefit to your case?

A. Well, it would mitigate somewhat in that they were presenting the scenario that when the knife went into the neck the fellow was paralyzed and couldn't move and that possibly Gibson or whoever continued to stab the man after he was no longer struggling. And I was trying to make the point that perhaps there were no stabs -- that this knife fight or stabbing occurred as a result of a physical confrontation in an effort to rob and that once the victim ceased struggling that Gibson withdrew and didn't continue to perpetrate this stabbing.

Q. And what was Dr. Sperry's opinion at trial based on the physical evidence of whether that was, in fact, the scenario that had occurred?

A. Well, I accused him of trying to change his story in the cross examination.

Q. Would that have been beneficial as far as the credibility of that witness before the jury, if you were able to do that?

A. Yes, the impeachment. I think, I think if I remember correctly, maybe he was trying to argue or his position was that the nature of some of the cuts indicated that they were done with the broken edge of the knife which had to have taken place after the stab wound to the neck.

Q. Now, do you recall that there was an issue, pre-trial and during the trial about your subpoena of Dr. Sperry and other GBI witnesses, potential witnesses?

A. I believe that we had subpoenaed or attempted to subpoena some of their lab data which I anticipated their response to that or the response of the Office of Attorney General which was to move to quash the subpoena and request sanctions against myself.

Q. Now, that was the state of the law at that time with regard to the issue of subpoenaing the documents and other crime lab information?

A. Well, as I recall, at the time, there was -- it was in question. There was -- the door seemed to be cracked open a little bit about that and there was a case up on appeal, I believe at the very time that that took place arising out of the same circuit where I practice law. So, I felt like this was an issue that was worth raising on appeal as we subsequently did.

Q. All right. Did you have -- did you do any research into that issue, in raising it as an issue in your trial?

A. Yes.

Q. All right. Do you recall what the scope of that research was?

A. No -

Q. All right. You mentioned that --

A. Well, I recall, let me just say this. I remember the chief progenitor or proponent of that live argument is an attorney in Dublin by the of Wash Larson, and I believe I spoke to Wash about it before I filed the motion.

Q. Do you recall whether he was able to provide you with any helpful information?

A. I think perhaps he had provided me with copy of the brief that he had filed in that connection in the case that he was working on.

Q. And did you raise this as an issue in the appeal in this case?

A. Well, frankly, I withdrew the motion, I believe, at the trial, if I remember correctly. We withdrew the motion because of the Attorney General's efforts to seek sanctions against myself for filing the motion. There was concern or the argument made that I was not going to expose myself to the contempt of the Court and we withdrew the motion, but we did raise the issue on appeal about the Attorney General's office effort to quash the subpoena.

Q. Was the appeal on that issue successful?

A. No, and, I might add that, to my understanding, Larson was ultimately not successful in his line of argument on this issue about discovery of these records.

Q. All right. I provide you with what Is been marked with Respondent's Exhibit 3, which I will show to you, Mr. Gibson, and ask you do you recognize that document?

A. It's a letter, copy of a letter, from myself to Mr. Larson back on June 11, 1990, thanking him for a copy of the brief that I referred to earlier.

Q. And what was that case?

A. Mr. Larson's case?

Q. Yes.

A. I believe it was, the fellow's name was Eason.

Q. And was that the case that eventually decided the issue with the Supreme Court, in the Georgia Supreme Court?

A. I think so.

Q. Was that the case that you were referring to?

A. Yes, yes.

MS. WHITAKER: Your Honor, I tender Respondent's Exhibit Number 3.

THE COURT: Any objection, Mr. Gibson? Any objection?

MR. GIBSON: I don't have an attorney, Your Honor.

THE COURT: okay, admitted.

MS. WHITAKER: Thanks.

Q. You mentioned that you had withdrawn the subpoenas in the case. Do you recall which witnesses from the GBI did testify in the case?

A. From the GBI?

Q. I'm sorry from the crime lab?

A. Well.

Q. Excuse me.

A. Sperry testified, Dr. Sperry. I don't recall there may have had, I'm sure they had, someone probably about blood and possibly fingerprints or shoe prints or whatever. I don't recall who they were.

Q. Turning to the sentencing phase of the case, were you able to develop any mitigation case to present on behalf of your client?

A. Yes.

Q. And what was that case, what was that theory?

A. Well, really, two-pronged, I guess you would say. One was his youth at the time of the incident. If I remember correctly, he was only 17 at the time this took place. I believe he turned shortly -- I believe by the time we had got to trial he had turned 18, if memory serves. And Exzavious's background, his upbringing, his family life or lack thereof. I tried to present that to the jury. He had basically been from pillar to post all of his life.

Q. Did you --

A. He never had any kind of -- much of a homelife.

Q. Were you able to contact any witnesses in regard to that to his background?

A. Yes, I remember speaking to an aunt, who I believe subsequently testified at trial who did as much as anybody to raise him. I believe it was Ms. Christopher. I think she was from Maryland or somewhere, the Mid-Atlantic.

Q. Were there any witnesses in the Eastman area that you were able to talk to about Mr. Gibson's background?

A. I want to say there was a young lady there in Eastman, but I -- who may have been a friend of his and known him for a short while before this took place. Because he had only been in Eastman for relatively -- just a bare, few number of weeks before this took place.

Q. Did you talk to any other family members other than the aunt who testified at trial?

A. I spoke to a lady down in Florida, I can't recall her exact relationship, if she was an aunt or what, and I believe I spoke to Mr. Gibson's grandmother.

Q. Do you recall the names of any of these people?

A. There was an Addie Johnson. I don't recall exactly which lady she was.

Q. Was she the lady from Florida, to your recollection?

A. I can look at my file.

Q. If you would.

A. I might add that Mr. Gibson's mother as I was told, Mr. Gibson's mother was deceased, herself a victim of a homicide. Mr. Gibson's father, biological father, had played little or no role in his upbringing.

Q. Were you able to present that mitigation evidence in the case?

A. I'm sure we did. There was a -- I have a Jackson that I spoke to who was apparently an aunt.

Q. Did Lula Jackson eventually testify at trial?

A. I don't recall. I really don't.

Q. Did you find out any of the family members other than Falstein Christopher to be particularly helpful to your mitigation case?

A. No, Falstein was the one that took the most interest in, as far as my dealings with them, who took the most interest in Exzavious and his situation.

Q. You mentioned previously that you spoke with the grandmother or someone you believed to be the grandmother?

A. I believe I spoke to, again, I don't know that she was his grandmother. I believe I spoke to the lady that lived there in the house where he was arrested.

Q. What was your impression of her?

A. Sort of like she, I mean, didn't want to get involved. I mean, it wasn't that she wasn't concerned, but it

was just that she didn't have a great deal to offer in the way of helping me with Exzavious' case.

Q. Did you have an investigator to assist you in this case?

A. No.

Q. Did you consider moving for funds for an investigator?

A. I probably considered it, but did not do it.

Q. All right. Any particular reason why not?

A. Frankly, I just didn't see the need for it. Again, with the open file policy and the statements that I had taken from Mr. Gibson himself, there were -- any discrepancies were just pretty minor between what he was telling me and what the State was showing me.

Q. And you mentioned the fact that you didn't present a guilt-innocence -- any testimony at the guilt-innocence phase. is that right?

A. Did not present any testimony?

Q. At the guilt-innocence phase?

A. I don't recall testifying to that, but I don't know that we did. I would just have to refer to the record.

Q. All right. If you would again.

A. Sure.

Q. That's the trial transcript.

A. No, we did not.

Q. All right. Do you recall why you didn't present any evidence at that phase of the case?

A. Obviously, it just wasn't, I mean, there wasn't anything that I knew that I felt would be helpful in regard to guilt-innocence.

Q. Would there have been a -- or did you consider the possibility of a plea to the guilt-innocence phase and sentencing before the jury?

A. Yeah, I considered that, but, first of all, I saw no reason in giving up the requirement that the State prove guilt in a death penalty case. I didn't see any tactical advantage to be gained by doing that. I didn't see that that was going to create an impression in the jurors minds that we were a couple of penitents. I just didn't think that that was going to help any and, quiet frankly, I felt that it would be in Mr. Gibson's advantage to create as much of a record as possible.

Q. Do you mean for purposes of appeal?

A. Yes.

Q. If there were an eventual conviction?

A. Yes.

Q. Do you recall what other witnesses you decided to present in mitigation other than Falstein Christopher?

A. I'd have to refer to the record. It appears that we called Falstein Christopher, Sharon Lampkin Jordon and Mr. Gibson himself.

Q. All right. And what would you have done, if anything, to prepare Mr. Gibson to testify in the mitigation phase of trial?

A. Well, I'm confident that I would have conveyed to him that this was the most important thing he had ever done in his life or the second most important thing that held ever done in his life, and that he needed to convey to that jury his remorse and that a reason, you know, a reason that he should be spared.

Q. Do you recall your impression of how successful his testimony was in playing out those two roles?

A. I thought it was, I thought his testimony was pretty good. I thought Exzavious made a pretty good

witness. As you know, we were able to prevent the State from using the videotaped statement which the interrogation that the GBI conducted shortly after the homicide, which I felt would have been very damaging, especially given his demeanor in that statement. I thought Exzavious made a pretty good witness. You know, you can only go by what other people tell you after the fact, but several of the court room observers said that they were pretty sympathetic to Mr. Gibson's plight and would have, you know, maybe done it differently as far as the ultimate verdict.

Q. Were you able to uncover any history of abuse in Mr. Gibson's childhood?

A. Gibson related to me that, I think, that Falstein had used corporal punishment and maybe gone overboard on occasion in that regard. I believe, he told me that. That's really all I was able to develop. He never told me you know, go up to Maryland or call the people in Maryland or call DFACS in Maryland and they will tell you, oh Lord, Falstein was the worst, most abusive mother, none of that. He never related that there was any history of the authorities getting involved or anything of that nature.

Q. Do you recall whether you investigated that issue further with Falstein herself?

A. I don' t recall. I think that I probably did, but I just don't recall particularly.

Q. Were your meetings with Falstein prior to the trial over the telephone or in person?

A. I know met with her in person on more than one occasion, but I may have spoken with her by phone as well, because Irecall, I believe she went back to wherever it is she lives. She came down at some point, after, not long after he was arrested. That's where I met some of the other ladies that I spoke to. I recall speaking to some other family members along with Falstein. I believe they came to my office in Cochran and I interviewed them there.

Q. Were any of the other family members able to substantiate Mr. Gibson's stories of corporal punishment or abuse in his childhood?

A. Not to my knowledge.

Q. Did you consider having Mr. Gibson testify to that issue only on his own testimony?

A. Probably considered it, but, again, I don't recall. I don't recall that he did, and I don't recall that -- there was nothing that in my mind that made me think that that would be productive.

Q. Did Mr. Gibson have a criminal background?

A. My understanding was that he had some sort of -- he had left Maryland or whatever state it was up there under a cloud. He had some sort of aggravated assault charge up there that was, I believe, pending, and I think he went to Florida initially and I don't know if something happened there or not, but then he ended up in Eastman. And he had -- there was -- he was charged with another, some sort of crime, a robbery or something, the day before this took place, this homicide. I say he was charged, after the homicide, he was charged or implicated in this other incident.

Q. Were you aware of that incident at the time of trial?

A. Yes.

Q. Did you consider the possibility that his prior criminal background might be of any mitigating value?

A. No.

Q. How do you -- how did you think that would have played with the jury?

A. Well, I mean, I -- my efforts were directed toward keeping that out of their consideration in the case. I would think that as a juror that evidence that this individual has been involved in previous violent crimes, possibly

involving weapons, would only serve to aggravate the situation.

Q. Would that have been contrary to your theory that he was a young guy and should have been shown mercy?

A. Yes.

Q. What did the State present during the sentencing phase as their aggravation?

A. If I may have a moment. They presented evidence of an escape attempt that Mr. Gibson had made while he was incarcerated awaiting trial on these charges. That was, I mean, I can go further as well, but it was that.

MS. WHITAKER: I show Mr. Gibson what has been marked for identification, Respondent's Exhibit 4.

THE COURT: Do you want to look at that Mr. Gibson? Pardon?

MR. GIBSON: No, sir.

THE COURT: Okay.

Q. I submit this to the witness. Do you recognize that?

A. You've handed me an exhibit marked Respondent's Exhibit 4. This is four pages. Appears to be a photostatic copy of some documents which were seized from Mr. Gibson's cell shortly after the escape attempt or at the time of the escape attempt.

Q. Were those -- originals of those presented as a part of the State's sentencing phase case?

A. I don't recall. I think the originals were used. I don't see why they wouldn't have been, but I know this was introduced.

Q. The originals or copies thereof?

A. Yes, Yes.

Q. All right. Do you recall whether you made any objection to the introduction of that evidence?

A. I did and we raised it on appeal as well.

Q. Now, did you have -- were you aware of this escape attempt prior to trial?

A. Oh, yes.

Q. Were you aware of that particular document prior to trial?

A. Yes.

Q. All right. And what is that document?

A. Well, it's a series of notes to the -- it says, entitled "To The Police." The second page is, appears to be a hand drawn cartoon and the, well, the third and fourth pages appears to be duplicates of one another, but this is a note entitled "To Whom It May Concern".

Q. And what's the subject of that note?

A. This escape attempt or the escape.

Q. And who was the author of that note?

A. Well, it was alleged to be Mr. Gibson.

Q. Is that the evidence that the State presented at the sentencing phase?

A. Yes, part of it.

Q. And did you discuss with Mr. Gibson that the State would probably present that evidence in aggravation at sentencing?

A. Oh, yes. I might even add that I discussed it before it happened. I told him, you know, part of my standard procedure with jail case clients is to sit down and say don't write anything, don't draw any pictures, don't talk to any fellow inmates, don't talk to the jailers, and don't try to escape. And I remember absolutely, positively, that I did that with Mr. Gibson before this took place.

MS. WHITAKER: I show Mr. Gibson what I have marked for identification, Respondent's Exhibit Number 5.

THE COURT: Do you want to look at that Mr. Gibson?

MR. GIBSON: No, sir.

Q. Mr. Mullis, do you recognize that document?

A. Yes, it's a copy of a letter of mine of March 27, 1990, which apparently was before the escape attempt, but that's just my conclusion, which I wrote to Mr. Gibson. I think I wrote this in response to a letter or some communication that he had presented to me.

Q. And what's the substance of that letter?

A. I said to him, "As I indicated to you in Court on Monday, it is extremely important that you refrain from writing anything directly concerning your case or making any drawings. I must admit that you have some talent in this area, but this is something you are going to have to avoid for a while. As I indicated to you, law enforcement will seize these and try to use them against you in a thousand different ways. There is no sense in worsening your situation. We will need all of the help we can get and there is nothing to be gained by giving the other side any ammunition."

Q. And was the drawing and the letter that has been marked Respondent's Exhibit 4 used in exactly the way you had predicted --

A. Yes.

Q. -- in sentencing against your client. What was your impression of the effect of that evidence on the jury?

A. I don't know. I really, really don't know. I, you know, the tenor of the note is very joking and condescending, but I, you know, I couldn't tell from the jurors. demeanor it made, what sort of impression it made, really.

Q. Were you able to present any evidence or conduct any cross examination to try to mitigate any effect, adverse effect, that that letter might have had on the jury in the case?

A. I recall there was, Gibson, they had Gibson in a cell at the city jail, which was a pretty bad place to be. As I described it once, it was sort of like a cell they had Hannibal Lechter in in the movie. It was just sort of sat out in the room, in the middle of the room, and it was a woven steel band enclosure. And he wanted to be in the county lockup, as I recall, anywhere, short of being out and free. He wanted to in the county lockup and, and they wouldn't move him. I think that we had asked that he be moved, and we tried to present that to the jury to show that his escape was motivated not out of a desire to abscond, but -- or his attempted escape was motivated not out of a desire to abscond, but just to get away from these circumstances. I don't, well --

Q. Do you recall how you presented that evidence?

A. No, I don't.

MS. WHITAKER: Your Honor, I will tender State's Exhibit Number 5, and, also, State's Exhibit Number 4, which is already in the record, but just for the convenience of having it as part of these hearings.

THE COURT: Now what is 1, 2 and 3?

MS. WHITAKER: What are they?

THE COURT: Did you tender those?

MS. WHITAKER: Yes, sir, I believe those are already admitted.

THE COURT: Okay. Any objection, Mr. Gibson?

MR. GIBSON: Your Honor, I don't waive any rights, but I don't have any counsel, so I don't

know what to say about anything you have asked me or anything [illegible] will ask me.

THE COURT: Okay. Okay. They're admitted.

MS. WHITAKER: Your Honor, if I could have just a second to mark a few more exhibits.

THE COURT: Yes, ma'am.

MS. WHITAKER: Thank you. This Respondent's Exhibits Number 6, 7 and 8 for identification.

THE COURT: Okay.

MS. WHITAKER: I show these to Mr. Gibson.

THE COURT: Do you want to look at those Mr. Gibson?

MR. GIBSON: I don't know.

THE COURT: Do you want to look at them?

MR. GIBSON: I don't have counsel, I don't have any idea what any of these --

THE COURT: I know that, but do you want to look at them?

MR. GIBSON: No.

THE COURT: Okay.

Q. Mr. Mullis, do you recognize these documents?

A. These are letters from Mr. Gibson to myself.

MS. WHITAKER: Your Honor, I would like to tender those exhibits as evidence of Mr. Gibson's apparent mental capabilities in the case and his understanding of his trial as it was progressing.

THE COURT: In relation to the claim of the ineffective assistance of counsel?

MS. WHITAKER: Yes, sir, and, additionally, in relation to what I anticipate to be issue on the appeal in this case which is that Mr. Gibson is pro se.

THE COURT: Mr. Gibson, do you have anything you want to tell me about that, anything want to say in that regard?

MR. GIBSON: I don't know what pleadings to make because I don't have counsel.

THE COURT: Okay.

MR. GIBSON: I don't waive any rights.

THE COURT: Okay, sir. They'll be admitted.

MS. WHITAKER: Your Honor, if I may have just a minute.

THE COURT: Yes, ma'am.

Q. Mr. Mullis, how did you go about determining which issues to raise on appeal in this case?

A. Well, of course, my own recollection of the trial, review of the transcript, consideration of the case law applicable thereto, conversation with the petitioner.

Q. Did Mr. Gibson have any issues that he indicated to you that he wanted you to address on appeal?

A. Not that I can recall.

Q. Did you discuss with him the issues that you were considering raising on appeal prior to filing the appeal itself?

A. I believe I did.

Q. All right. I have nothing further, Your Honor.

THE COURT: Mr. Gibson, would you like to ask Mr. Mullis any questions?

MR. GIBSON: I don't have any counsel.

THE COURT: I understand that, but I am just asking, can you tell me yes or no whether you want to ask him any questions or not?

MR. GIBSON: I'm not my own counsel.

THE COURT: I'm sorry, sir, I didn't understand you.

MR. GIBSON: I'm not my own counsel.

THE COURT: I understand, but do you want, do you, yourself, individually, want to ask him anything?

MR. GIBSON: I don't know.

THE COURT: Okay, sir. okay, thank you, Mr. Mullis, you can go down.

MR. MULLIS: Thank you.

MS. WHITAKER: Your Honor, I would like to at this time inquire of Mr. Gibson the circumstances of filing this petition.

MS. WELLS: Your Honor, this is improper, Ms. Whitaker can't ask --

THE COURT: Ms. Wells, Ms. Wells, Ms. Wells. I have warned you once. You stand up again and interrupt these proceedings, I'm going to ask them to escort you out. Do you understand that?

MS. WELLS: Yes, Your Honor.

THE COURT: Please have a seat.

MS. WELLS: But, I cannot sit back and watch this happen.

THE COURT: Officer, would you please escort her out of here, please?

MS. WELLS: Mr. Gibson cannot be expected to know what to do in this situation. He has no attorney.

THE COURT: Ma'am, ma'am.

MS. WELLS: He has no attorney.

THE COURT: Ma'am, you are not helping this man one bit, please leave.

MS. WELLS: Your Honor, he has no way of knowing --

THE COURT: We'll be in recess. And, Officer, I ask you to please escort her out, please.

[Recess]

THE COURT: Okay, Ms. Whitaker, anything else on behalf of the State.

MS. WHITAKER: I'd just like to ask that one question.

THE COURT: Okay, you want to inquire of him what?

MS. WHITAKER: I would like to inquire of Mr. Gibson whether he approached the Resource Center or whether with regard to the filing of this petition?

THE COURT: Okay. Mr. Gibson, can you respond to that, please?

MR. GIBSON: I don't recall.

THE COURT: You don't recall. Okay, sir.

MS. WHITAKER: I don't have anything further.

THE COURT: Anything else you'd like to say to the Court or present to the Court, Mr. Gibson?

MR. GIBSON: Nothing other than I don't waive any rights to this proceeding. I don't have counsel.

THE COURT: Okay. I understand that. Can you tell this for the record, Mr. Gibson, how old are you?

MR. GIBSON: Twenty-four.

THE COURT: And how far did you go in school?

MR. GIBSON: I don't recall.

THE COURT: Okay. Can you read and write the English language? I mean, I've noticed you taking notes there so, obviously, you can write the English language. I presume you understand it.

MR. GIBSON: I don't have any counsel, so I don't think I should - -

THE COURT: Are you under the influence of any alcohol or drugs at this time?

MR. GIBSON: Not that I know of.

THE COURT: Okay. Anything else on behalf of the State?

MS. WHITAKER: No, sir.

THE COURT: Okay. We'll be in recess. The Court will take it under advisement. We'll render a decision within the prerequisite, required period of time which is, what is it thirty, sixty?

MS. WHITAKER: I believe its sixty or a hundred and twenty days.

THE COURT: Sixty days, okay. Any other matters you think we need to take up or any other rights or advice we need to give Mr. Gibson, Ms. Whitaker, before we leave?

MS. WHITAKER: I think Mr. Gibson should be aware that this is his first habeas corpus proceeding and while -- and that if he chooses to file another one anything that he doesn't raise in this one is going to probably be found to be waived under Georgia Law.

THE COURT: With that statement, Mr. Gibson, do you have anything else you want to tell

me, anything else you want to tell the Court, any other evidence you want to present?

MR. GIBSON: No, sir.

THE COURT: Thank you very much. We will be in recess.

(HEARING CONCLUDED)

MOTION FILED
AUG 6 1999

No. 99-77

IN THE

Supreme Court of the United States

EXZAVIOUS LEE GIBSON,

Petitioner,

—v.—

TONY G. TURPIN, WARDEN,
GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

No. 99-77

EXZAVIOUS LEE GIBSON,

Petitioner,

V.

TONY G. TURPIN, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent.

MOTION OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

The NAACP Legal Defense and Educational Fund ("LDF") hereby respectfully moves for leave to file the attached brief as *amicus curiae* pursuant to Rule 37.2(b) of the Rules of this Court. Petitioner has consented to the filing of this brief. Respondent has refused consent.

INTEREST OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND

LDF is a non-profit corporation formed to assist African-American citizens to secure their rights under the Constitution and laws of the United States and chartered by the Appellate Division of the New York Supreme Court as a legal aid society. *See NAACP v. Button*, 371 U.S. 411, 415 (1963) (recognizing LDF's

"corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

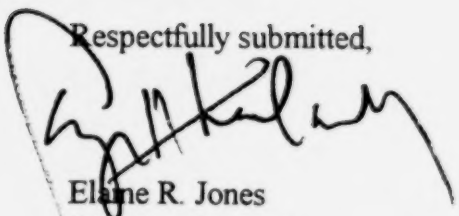
LDF has long been involved in efforts to provide counsel for indigent condemned prisoners in state and federal post-conviction proceedings. Since this Court's decisions in 1976 allowing the resumption of capital punishment, *Gregg v. Georgia*, 428 U.S. 153(1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976), lawyers employed by LDF have represented hundreds of individuals sentenced to death in state and federal post-conviction proceedings in Georgia and other states, recruited lawyers to provide *pro bono publico* representation and given advice to lawyers who have come forward to provide such representation.

Our experience in these matters has taught us, particularly in light of jurisprudential changes in habeas corpus since *Giarratano*, that it is now impossible for a condemned inmate to represent himself in a minimally adequate fashion in capital post-conviction proceedings. The states understand this point: only specialist in state attorney generals' offices represent the states' interests in these proceedings. We believe the time has come for the Court to declare that the Fourteenth Amendment's due process clause requires the provision of counsel services in these important post-conviction proceedings.

For the above-stated reasons, LDF respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae* in the present case in the support of the position of the Petitioner.

Dated: August 6, 1999

Respectfully submitted,



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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund (LDF) has repeatedly observed the crucial role lawyers play in capital post-conviction proceedings, both in vindicating the constitutional rights of poor people sentenced to death and in ensuring the even-handed administration of justice. This has been particularly true in Georgia, where relief has been granted as to conviction or sentence for over half of the individuals who first sought and were denied direct appeal relief, and who thereafter initiated and pursued post-conviction remedies.

Amicus has observed the problem of lack of representation in post-conviction proceedings grow well beyond the crisis stage since the demise of the post-conviction defender organizations five years ago.[2] While lawyers employed by LDF continue to handle a small number of capital post-conviction cases, recruit volunteer lawyers, and assist lawyers they and the American Bar Association's Death Penalty Representation Project have recruited, there remain more death-sentenced individuals without counsel than lawyers willing to represent them.

SUMMARY OF ARGUMENT

This case presents an important issue for the administration of the death penalty: Whether the Fourteenth Amendment's promise that life not be taken without due process requires states to provide

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[1] This brief was prepared by counsel of record for *amicus*, with abundant assistance from LDF summer intern Deborah Cornwall. No party or third party made any financial contribution in support of these efforts.

[2] *See* Roscoe C. Howard, Jr., *The Defunding of the Post-Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 912-15 (1996) (describing the elimination of funding for the resource centers).

competent counsel to indigent prisoners for capital state post-conviction proceedings?

Ten years ago, this Court considered this question in *Murray v. Giarratano*, and, in a 5-4 decision, held narrowly that the Constitution did not require the states to provide counsel.[3] Justice Kennedy, a member of the majority, wrote that his vote rested in part on the fact that Virginia provided by statute for the appointment of counsel in state post-conviction proceedings and that no inmate in that state had been left to negotiate those waters without legal assistance.[4] The four dissenting Justices concluded that because of the complexity of the capital post-conviction process, the limited reading and writing skills of many condemned inmates, and the fact that certain claims raised in such proceedings require investigation and the presentation of evidence, the Constitution indeed requires the provision of counsel in such proceedings.[5]

In the decade since *Giarratano*, changes to post-conviction practice mandated by the Court, Congress, and many states including Georgia have transformed this remedy for wrongful incarceration. Today, state and federal remedies operate more swiftly than before, are governed by law considerably more complicated than a decade ago, and seldom tolerate mistakes, even those made in good faith. Prisoners must now bring their cases to the state and federal courts more promptly, include in the initial petition every possible meritorious claim, and support each with all relevant facts. Much more so than a decade ago, any failure to timely present both the claim and the supporting facts, regardless of

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[3] 492 U.S. 1, 11 (1989).

[4] *Id.* at 14.

[5] *Id.* at 19, 27.

the merit of the claim, will result in the claim not being heard in either state or federal proceedings. Due process requires the provision of counsel in this newly accelerated, more final, more rigid capital post-conviction review system.

In this case, Exzavious Gibson, an indigent, mentally impaired, African-American condemned man in Georgia, asks that the Court revisit this question. Unlike Virginia, and now every other state that utilizes the death penalty, Georgia makes no provision for the appointment of competent counsel to its indigent condemned persons for post-conviction proceedings. Consequently, Mr. Gibson was forced to represent himself at his state post-conviction hearing. The record leaves no room to doubt his patently inadequate performance in a role for which he had neither relevant training nor experience.

We urge the Court to grant review here because significant changes in the law governing post-convictions proceedings compel reconsideration of *Murray v. Giarratano*. During the past decade, federal and state habeas law has become more complex, and it has become virtually impossible for imprisoned, often illiterate and mentally impaired individuals like Gibson to master and comply with the rules governing post-conviction review. Moreover, these changes have led fewer attorneys to volunteer to represent the condemned in these proceedings. Our experience in post-conviction cases from Georgia during this time shows that (1) more often than not, harmful constitutional errors mar state trials, (2) these errors are not corrected on direct review, and (3) often the merit of these claims are demonstrated in post-conviction proceedings only after considerable investigation and record supplementation, essential tasks that cannot be accomplished from a death row cell.

ARGUMENT

I. The New Habeas Landscape is More Complex, More Accelerated and Far Less Tolerant of Mistakes, However Technical.

When this Court decided *Giarratano*, several Justices noted that capital post-conviction procedure was already complicated and well beyond the ability of most condemned inmates to navigate effectively without the aid of counsel. If the "Court's death penalty jurisprudence unquestionably [was] difficult for a trained lawyer to master,"[6] then, as Justice Kennedy's concurrence noted, its "complexity... [made] it unlikely that capital defendants [would] be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[7]

Not long thereafter, the Court squarely recognized as much. In *McFarland v. Scott*, the Court held that the complexity of the *federal* habeas process could require the appointment of counsel for indigent capital prisoners even before a petition is filed.[8] McFarland had been convicted of capital murder and had repeatedly filed unsuccessful requests to stay his execution date in state court to allow time to locate volunteer counsel to represent him in post-conviction appeals.[9] The state court refused to appoint counsel, and McFarland's skeletal *pro se* motion in federal district court seeking a stay of execution and the appointment of counsel to prepare a

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[6] *Giarratano*, 492 U.S. at 27 (Stevens, J., dissenting).

[7] *Id.* at 14 (joined by O'Connor, J., concurring in the judgment); *see Murray v. Carrier*, 477 U.S. 478, 496 (1986) (federal habeas review is a "procedural maze of enormous complexity.") (Stevens, J., concurring).

[8] 512 U.S. 849, 858 (1994).

[9] *Id.* at 851-52.

habeas petition was denied.[10] Reversing the Fifth Circuit, the Court adopted the reasoning of Justice Kennedy's *Giarratano* concurrence and held that "[a]n attorney's assistance prior to the filing of a capital defendant's habeas corpus petition is crucial," because "[t]he complexity of our jurisprudence in this area ... makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law."[11] Mindful of the exceedingly intricate habeas jurisprudence and strict default rules, six Justices acknowledged that "[r]equiring an indigent capital petitioner to proceed without counsel in order to obtain counsel . . . would expose him to the substantial risk that his habeas claims never would be heard on the merits."[12]

As the *McFarland* Court observed, since 1989 the system has grown considerably more difficult for attorneys -- much less indigent capital prisoners on their own -- to navigate effectively. As we show below, during the last decade several decisions from this Court as well as Congressional amendments to federal habeas law, have reconfigured the post-conviction remedy so that it works faster, is more complicated, is more final, and is less tolerant of litigants' uninformed mistakes and errors on even highly technical matters. Thus, while the need for counsel to ensure even-handed administration of justice was indeed strong in 1989, it is overwhelming today.

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[10] *Id.* at 852-53.

[11] *Id.* at 855-56, *citing Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring).

[12] *McFarland*, 512 U.S. at 856.

A. Several decisions since 1989 have made this process more complicated and less comprehensible for pro se *applicants.*

Since considering this issue in *Giarratano*, the Court has significantly changed the habeas remedy. On each occasion, it has replaced rules that were generally tolerant of negligent mistakes made by prisoners and their counsel with rules that foreclose relief except in very limited circumstances. The collective effect of these changes has transformed habeas from a flexible process to one governed by strict procedural rules, and thus requires the Court to make one further change: to hold that due process requires the provision of counsel services in capital post-conviction proceedings.

For example, in *Coleman v. Thompson*, a case in which volunteer counsel inadvertently filed a state habeas appeal three days late, the Court held that subsequent federal review was foreclosed because the judgment dismissing the state habeas appeal as untimely constituted adequate and independent state grounds.[13] This rule replaced a more flexible standard that presumed federal merits review remained available absent clear evidence that the prisoner had deliberately bypassed the appeal.[14] In this same vein, the Court recently announced in *O'Sullivan v. Boerckel* that a similar default rule applies to state discretionary appeals where a prisoner fails to include all claims she wishes to present in federal habeas proceedings.[15] If competent attorneys occasionally forfeit claims by failing timely to meet and satisfy state procedural rules,

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[13] 501 U.S. 722 (1991).

[14] *Fay v. Noia*, 372 U.S. 391 (1963).

[15] 67 U.S.L.W. 4389 (June 7, 1999).

indigent *pro se* prisoners are even more likely to run afoul of them.[16]

One year after *Coleman*, the Court in *McCleskey v. Zant* again replaced a more forgiving standard with a strict default rule, this time barring the consideration of claims presented for the first time in second or subsequent federal habeas petitions.[17] McCleskey claimed in his initial state habeas petition that the state's use at his trial of conversations with a jailhouse informant violated his Sixth Amendment rights under *Massiah v. United States*,[18] but did not repeat that claim in his initial federal habeas petition because he lacked evidence to prove it.[19] One month before filing his second federal habeas petition, McCleskey received previously undisclosed state documents which strongly supported his claim.[20] The District Court held extensive hearings and granted relief.[21] However, this Court held that the second petition was an "abuse of the writ" that precluded consideration on the merits.[22] In so doing, the Court rejected its prior "deliberate abandonment" standard for a more stringent test requiring petitioners to show "cause and prejudice" for

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[16] *See, e.g., Fullwood v. Sivley*, -- S.E.2d --, 1999 WL 343724 (Ga. 1999) (*pro se* prisoner's timely filing of notice of appeal from adverse state habeas rule did not timely preserve right to appeal as state law also requires timely filing of application for certificate of probable cause).

[17] 499 U.S. 467 (1991).

[18] 377 U.S. 201 (1964).

[19] 499 U.S. at 472-73.

[20] *Id.* at 474.

[21] *Id.* at 475-76.

[22] *Id.* at 497-503.

"inexcusable neglect" in failing to include the claim in initial federal habeas petitions.[23]

McCleskey's lesson for habeas petitioners, as Justice O'Connor later warned, is that "the Court's reformed waiver and abuse of the writ doctrines make it especially important that the first petition adequately set forth *all* of a state prisoner's *colorable grounds* for relief."[24] In other words, petitioners must timely and adequately plead specific federal constitutional violations in the initial *state habeas* proceedings to preserve and exhaust them for federal review.[25]

The Court has since extended the reasoning of *Coleman* and *McCleskey* to bar in federal habeas the introduction of facts that

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[23] *Id.* at 490.

[24] *McFarland*, 512 U.S. at 860 (O'Connor, J., concurring in the judgment and concurring in part) (emphasis added).

[25] *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (per curiam) (to exhaust state remedies, petitioners must "fairly presen[t]" federal claims to state courts to give states the "opportunity to pass upon and correct" violations of its prisoners' constitutional rights) (citations omitted); *Myre v. Iowa*, 53 F.3d 199, 200 (8th Cir. 1995) (finding federal claim barred in state habeas because petitioners must "refer to 'a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue' in a claim before the state courts.") (citations omitted); *Brown v. Vasquez*, 952 F.2d 1164, 1166-68 (9th Cir.), *cert. denied*, 503 U.S. 1011 (1992) (under *McCleskey*, habeas petitioners have the "substantial burden" of "assert[ing] all possible violations of [their] constitutional rights in his initial application or run the risk of losing what might be a viable claim"); *see also McDougald v. Lockhart*, 942 F.2d 508, 510 (8th Cir. 1991) ("Explicit citation to the Constitution or to a federal case is necessary for fair presentation of a constitutional claim in state court").

were not timely presented in state post-conviction proceedings.[26] In *Keeney v. Tamayo-Reyes*, the Court held that state habeas counsel's negligence did not constitute cause excusing the failure to develop critical facts supporting the claim that petitioner did not understand the *mens rea* element of his *nolo contendere* plea due to an interpreter's faulty translation.

While these decisions are intended to preserve and support the dignity of the States' judicial branches, they may substantially increase the risk of erroneous conviction and sentence, including in capital cases. *Keeney*, for example, has significantly elevated the importance of finding and presenting all relevant facts in the first state post-conviction proceedings. In the absence of the guiding hand of counsel and access to investigative resources, indigent petitioners -- like Gibson -- appearing *pro se* will lack the ability to develop critical facts and will forfeit review of potentially meritorious claims as a result.[27] Fact-intensive claims that often require extensive prefiling investigation, such as *Brady* and *Strickland* violations in particular,[28] will be impossible for *pro se* petitioners to make out.

In the same year it decided *Giarratano*, the Court held in *Teague v. Lane* that federal courts could no longer grant relief if doing so would require the court to announce or apply a new rule

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[26] *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

[27] *See, e.g., Giarratano*, 492 U.S. at 19 (Stevens, J., dissenting); *cf. McFarland*, 512 U.S. at 855 ("The services of investigators and other experts may be critical in the preapplication phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified.").

[28] *Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984).

of criminal procedure.[29] *Teague* left open the precise definition of "new rules."[30] Subsequent cases reveal that the Court has still not agreed on the criteria for identifying new rules.[31] *Teague* and its progeny present a particularly formidable challenge to indigent *pro se* petitioners, who are even more unlikely than the Court or counsel to know whether a decision rendered after the date of finality is one that can or cannot be utilized in post-conviction proceedings because it announced or did not announce a new rule.

Finally, the Court adopted a more labor-intensive harmless

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[29] 489 U.S. 298 (1989).

[30] *Id.* at 301 ("It is admittedly difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes. In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government . . . [A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.") (citations omitted); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (applying *Teague* to capital as well as noncapital prisoners).

[31] *See e.g. O'Dell v. Netherland*, 521 U.S. 151, 156, 170 (1997) (5-4) (disagreeing over whether case in question involves a new rule); *Lambrix v. Singletary*, 520 U.S. 518, 528, 541 (1997) (5-4) (same); *Saffle v. Parks*, 494 U.S 484, 488 (1990) (5-4) ("[I]t is ... difficult ... to determine whether we announce a new rule when a decision extends the reasoning of our prior cases."); *Butler v. McKellar*, 494 U.S. 407, 418 (1990) (5-4) (Brennan, J., dissenting) ("[T]he analytical distinction between legal rules 'prevailing' at the time of conviction and 'new' legal rules is far from sharp."). *Compare id.* at 415 (stating that a rule is new if characterized by "significant difference of opinion on the part of several lower courts that had considered the question previously"), *with Graham v. Collins*, 506 U.S. 461, 467 (1993) (5-4) ("[U]nless reasonable jurists hearing petitioner's claim at the time his conviction became final 'would have felt compelled by existing precedent' to rule in his favor, we are barred from doing so now.") (citation omitted).

error standard for habeas cases in 1993.[32] The *Brecht* standard requires scrutiny of the entire record with the goal of determining whether the error had a "substantial and injurious effect or influence in determining the jury's verdict."[33] Although the rule imposes this demanding burden on both parties, a thorough review of the record is disproportionately burdensome to indigent inmates, who often lack access to the full record, to legal materials, and legal training to identify error.[34]

B. *Congressional action has accelerated this complex process.*

Congress' passage in 1996 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") further complicated habeas law.[35] The habeas amendments contained therein set forth a statute of limitations (one year for most petitioners after exhaustion of state remedies) for habeas actions.[36] This provision has shortened the time available to investigate and prepare for post-conviction review generally,[37] and has had the effect of accelerating the state habeas

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[32] *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[33] 507 U.S. at 622, *citing Kotteakos v. United States*, 328 U.S. 750, 776 (1946).

[34] *See, e.g., Giarratano*, 492 U.S. at 27 (Stevens, J., dissenting).

[35] Pub. L. 104-132, 110 Stat. 1214 (1996), codified as 28 U.S.C.A. §§ 2241-55, 2261-66 (West Supp. 1998).

[36] 28 U.S.C.A. § 2244(d) (West Supp. 1998).

[37] *See, e.g., Fisher v. Johnson*, 1999 WL 284954, at *3-4 (5th Cir. 1999) (holding *pro se* petitioner's federal habeas petition time-barred and that neither the fact that he did not receive notice of AEDPA's statute of limitations until 43 days after its effective date, when a copy of the provision arrived in the prison

filing process. The tolling provisions in § 2244(d) are unclear and remain so,[38] not firmly establishing whether the statute of limitation is tolled for a stay of execution,[39] while a prefiling petition for appointment of counsel is pending,[40] while a case is between state courts,[41] or when petitions for certiorari are pending.[42] Yet any prisoner mistake during the state habeas filing process likely forfeits all later review.

Given the ambiguity of the tolling provisions and the inflexibility of the one-year statute of limitations in § 2244(d), petitioners are well advised to err on the side of filing federal habeas

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library, nor his 17 days spent in psychiatric ward, medicated, without glasses, and so rendered legally blind, and denied meaningful access to legal materials, held to constitute exception justifying equitable tolling).

[38] § 2244(d)(2) provides that "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." For divergent precedent interpreting this section and the tolling question, see generally James S. Liebman & Randy Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 5.1b (3d ed. 1998) ("FHCPP").

[39] *See generally* FHCPP, *supra note 38, at* § 5.1b (surveying cases on statute of limitations and tolling); *see, e.g., Calderon v. United States Dist. Court for Cent. Dist. Calif.*, 163 F.3d 530, 541 (9th Cir. 1998) (en banc) (stating that a stay of execution motion coupled with *McFarland* motion for the appointment of counsel tolls statute of limitations).

[40] *See* FHCPP at §§ 3.4a, at 150 n.14, 5.1b, at 242-43 n.90 (surveying cases on tolling of statute of limitations for *McFarland* petitions).

[41] *See id.* at § 5.1b, at 238 n.65 (surveying cases).

[42] *See id.* at 238 n.65, 245 n.102 (surveying cases).

claims sooner rather than later in order to preserve the opportunity for a hearing on the merits of their claims. However, rushing to file federal habeas petitions can carry dire consequences. First, a hastily prepared federal habeas petition that does not plead all colorable federal claims will forfeit later review under the strict successor rule in § 2244(b)(2),[43] and might well constitute some type of default that bars review in the original petition.[44] Second, § 2244(d) compels prisoners to file state habeas petitions sooner in order to stop the federal clock and properly exhaust claims for federal review under § 2254(b)(1).[45] Yet hastily filing state habeas claims

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[43] "A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C.A. § 2244(b)(2) (West. Supp. 1998).

[44] The Court has granted review of this question. *Slack v. McDaniel*, No. CV-95-194-DWH (9th Cir. July 7, 1998) (order denying request for certificate of probable cause), *cert. granted*, 67 U.S.L.W. 3511 (U.S. February 22, 1999) (No. 98-6322) (Question Presented: If a person's petition for habeas corpus under 28 U.S.C. § 2254 is dismissed for failure to exhaust state remedies and he subsequently exhausts his state remedies and refiles the § 2254 petition, are claims included within the petition that were not included within the initial § 2254 filing "second or successive" habeas applications?).

[45] "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the state." 28 U.S.C. § 2254(b) (1). Although federal habeas courts cannot entertain claims until they are exhausted in state courts, state claims need not be

comes with an even greater price, as in many cases that proceeding will be the first and last opportunity to develop facts.[46] Claims that are not properly investigated or pleaded in state habeas will be defaulted under § 2254(e)(2),[47] and leave a "barren record"[48] that will effectively foreclose federal habeas review.[49] Some constitutional claims such as ineffective assistance of counsel may only be raised for the first time on state habeas. Violations of these fundamental rights go unremedied when rushed petitions, sloppy pleading and inadequate factual development foreclose meaningful

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exhausted for federal habeas courts to dismiss a petition on the merits. 28 U.S.C.A. § 2254(b)(2) (West Supp. 1998).

[46] "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C.A. § 2254(e)(1) (West Supp. 1998). *See, e.g.*, O.C.G.A. § 9-14-49 ("[T]he judge of the superior court hearing the case shall make written findings of fact and conclusions of law ... [which] shall be recorded as part of the record of the case.").

[47] "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless (A) the claim relies on (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C.A. § 2254(e)(2) (West Supp. 1998).

[48] *Douglas v. California*, 372 U.S. 353, 356 (1963).

[49] *See Wainwright v. Sykes*, 433 U.S. 72 (1977); O.C.G.A. § 9-14-48(d).

state habeas review,[50] a reality with particularly dire consequences for indigent capital petitioners compelled to appear *pro se*.

Congress itself recognized the need to appoint counsel in federal habeas capital cases,[51] and provided that states could receive even more expedited federal review if competent counsel services are provided in state post-conviction proceedings. However, while every state that uses capital punishment other than Georgia makes some provision for counsel in state post-conviction proceedings, no state known to us has yet established legal assistance programs sufficient to trigger this special status. Moreover, as the American Bar Association points out, the complexity of the new federal habeas rules have ironically functioned to deter attorneys from taking on capital cases.

C. *Georgia, like other states, has acted to speed up its post-conviction review system.*

In the wake of these significant changes to the federal habeas

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[50] *See, e.g., Breard v. Greene*, 118 S.Ct. 1352, 1353-54 (1998) (*per curiam*) (holding that § 2254(e)(2) applies to case and bars federal hearing because petitioner "fail[ed] to raise the claim in the state courts" and never sought state court hearing to establish facts essential for prevailing on claim); *Hines v. Lensing*, 1998 WL 603397, at *1 (E.D. La. Sept. 9, 1998) (stating that § 2254(e)(2) bars federal hearing on claim of ineffective assistance in failing to investigate because petitioner could have, but did not, support request for state court hearing with "[a]ffidavits, exhibits [or] other materials . . . to make an initial showing of the circumstances he believes should have been investigated"); *Royal v. Netherland*, 4 F. Supp. 2d 540, 554 (E.D. Va. 1998) (stating that § 2254(e)(2) bars hearing on claim that trial counsel was ineffective in failing to interview prosecution witnesses, because "petitioner did not take or seek the opportunity to develop . . . the factual basis of the claim in . . . state court").

[51] 28 U.S.C.A. § 2263(a) (West Supp. 1998); *cf.* 21 U.S.C. § 848(q)(4)(B) (1996) (providing post-conviction counsel in capital cases for *federal* habeas corpus proceedings).

remedy, Georgia has taken no step whatsoever to ensure that its post-conviction remedy is more available to identify and correct serious harmful violations of the federal constitution. Indeed, in the Death Penalty Habeas Corpus Reform Act of 1995, Georgia amended its habeas statute to accelerate review. Yet it made no provision whatsoever for the provision of counsel or investigative services despite the fact that only very experienced counsel from the Attorney General's Office handle capital cases in post-conviction proceedings. These amendments provide that all pretrial habeas motions must be filed within 60 days and discovery must be completed within 120 days of filing a petition.[52] An evidentiary hearing must be held within 180 days of the petition's filing,[53] and "[f]ailure to meet these requirements will result in the absence of *any* hearing on the merits for the habeas petitioner."[54]

Construction of these amendments has been strict. Recently the Georgia Supreme Court held that notwithstanding the practical reality that the short appeal window would "force [the petitioner] to file his application for certificate of probable cause before the habeas record has even been prepared,"[55] the procedural default for failure to meet the strict 30-day timetable for appealing an adverse state habeas ruling[56] would bar further review of the claims, even

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[52] GA. CT. R.44.

[53] Id.

[54] *Gibson v. Turpin*, 513 S.E.2d 186, 197 (Ga. 1999) (Fletcher, P.J., dissenting) (emphasis added).

[55] *Id.* at *9 (Sears, J., dissenting).

[56] O.C.G.A. § 9-14-52.

for indigent *pro se* petitioners.[57] The dissent accused the majority of construing the state statute as another "trap for the unwary, a means of preventing consideration of the merits that amounted to a blanket denial of the Great Writ, in fact, to a suspension of the writ."[58]

Indigent *pro se* state habeas petitioners like Gibson, who lack basic education, much less legal training, or even adequate access to legal materials,[59] cannot reasonably be expected to be able to comply with these demanding technical requirements in order to present even meritorious claims. In this case, the Warden's attorney, a highly experienced assistant Attorney General, specifically warned Mr. Gibson that he "should be aware that this is his first [state] habeas corpus proceeding and, if he chooses to file another one anything that he doesn't raise in this one is going to probably found to be waived under Georgia law."[60] Gibson, whose IQ is 76, was unable to articulate a federal constitutional claim, but stated only, "I don't have an attorney . . . I don't waive any rights."[61]

Thus, on these several fronts, changes in post-conviction law since 1989 have made it virtually impossible for a condemned

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[57] *Fullwood v. Sivley*, -- S.E.2d --, 1999 WL 343724, at *5 (Ga. 1999).

[58] *Id.* at *6 (Benham, C.J., dissenting).

[59] *See, e.g.*, Mark D. Cunningham. and Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: A Study of the Self-Representation Competency of Mississippi Death Row Inmates*, CRIM. JUST - BEHAV. (forthcoming 1999) (assessing death row inmates' abilities, relevant aptitudes, legal knowledge and psychological ability to represent themselves).

[60] Record at 70, *Gibson v. Turpin*, No. 95-V-648 (Super. Ct. Butts County Sept. 12, 1996).

[61] *Id.* at 94-95.

inmate, from his or her cell, fairly to plead *and* prove his entitlement to habeas relief. Moreover, while the average state post-conviction case required at least 600 hours of legal work in 1989, the time necessary today is even greater.[62] Yet Georgia provides no counsel for capital habeas petitioners.[63]

II. In Georgia It Is More Likely Than Not That Harmful Constitutional Error Mars a Capital Conviction or Sentence and Is Not Remedied on Direct Review.

The availability of counsel for capital post-conviction proceedings might be of little concern if the harmful errors that occur were usually remedied on direct appeal. In Georgia, however, the post-conviction reversal rate for capital cases, as the Southern Center for Human Rights' brief points out, is staggering.

In many of these cases, the harmful error would surely not have been detected and proven in the absence of volunteer counsel. Indeed, as Mississippi's highest court recognized recently:

> The reality [is] that indigent death row inmates are simply not able, on their own, to competently engage in this type of

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[62] *See* Brief of the American Bar Association (ABA) at 34, *Giarratano* (No. 88-411); Richard J. Wilson & Robert L. Spangenberg, *State Post-Conviction Representation of Defendants Sentenced to Death*, 72 JUDICATURE 331, 336 (1989); *see also Giarratano*, 492 U.S. at 27 n.20 (Stevens, J., dissenting) (citing 1988 ABA study finding that attorneys spent an average of 992 hours and $3696 on each capital post-conviction proceeding in Virginia) (citation omitted).

[63] Wyoming, the only other state that did not provide counsel to capital habeas petitioners at the time of Gibson's habeas hearing, recently amended its laws to give all capital inmates the right to counsel in post-conviction proceedings. *See Gibson*, 513 S.E.2d at 198, n.37 (Fletcher, P.J., dissenting), as amended; Fulton County *Daily Report*, June 14, 1999, p. 20, citing SEA 41, 55th Leg., 1999 Session (Wyo.) (to be codified at Wyo. Stat. Ann. § 7-6-104(c)(ii)(1999)).

> litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [state habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.[64]

In our post-conviction work on capital cases in Georgia since *Giarratano*, we have handled numerous cases where extremely prejudicial error marred the trial, and was either not raised or remedied on direct appeal. No court would likely ever have determined the effect of these errors on the capital convictions or sentences had it been left to the *pro se* petitioner to raise and develop these claims.[65]

For example, in *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 695 (11th Cir. 1990), five independent, harmful violations of the Constitution were determined to have deprived the petitioner of a fundamentally fair sentencing determination; Ms. Buttrum was wholly unable to identify these issues and ably present and argue them to a court of law.

In *Roberts v. Zant*, No. 3:92-CV-28-GET (N.D. Ga. 1992), the district court found that the trial court's rushing the case to trial a mere six weeks after the appointment of inexperienced counsel showed an egregious violation of due process and denied petitioner the right to effective representation. Both claims were heavily dependent upon the testimony of nearly 20 witnesses we presented

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[64] *Jackson v. State*, 1999 WL 33904, at *3 (Miss. 1999) (not yet released for publication).

[65] The *amicus curiae* brief of the Southern Center for Human Rights discusses these cases in detail.

at a state habeas corpus hearing. It would have been impossible for Mr. Roberts to have assembled any of this evidence from his death row prison cell.

In *Hill v. Turpin*, 135 F.3d 1411 (11th Cir. 1998), the court granted full habeas relief on a prosecution misconduct claim, and thus did not have to reach the merits of several other meritorious claims -- including one fact-intensive *Swain v. Alabama*, 380 U.S. 202 (1965) claim -- that were based upon extensive evidence we presented in state post-conviction proceedings.

And in *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990), the state supreme court granted full habeas relief on an ineffective assistance of counsel claim. Mr. Ross, an African-American male with a long history of serious mental illness, was represented at trial by the former Imperial Wizard of the Georgia KKK, who conducted no pretrial investigation of any sort. During state habeas hearings, we presented numerous lay and expert witnesses whose testimony proved compelling enough for the state supreme court to grant full relief. Throughout, Mr. Ross was barely competent to proceed.

These experiences have left us with no doubt whatsoever that if the capital post-conviction process is to function at all, *both* the state and the indigent condemned must have access to competent legal services.

CONCLUSION

There is no way to know whether constitutional error deprived Mr. Gibson of a fundamentally fair trial. Surely the State of Georgia is in no position to assure the Court that this case is free of harmful error, or that we can all be sure that any such error would have been detected and remedied on direct appeal. It is time for the Court to revisit this issue, and to hold that a right to counsel exists for the pursuit of capital state post-conviction proceedings.

Dated: August 6, 1999

Respectfully Submitted,

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MOTION FILED
AUG 4 1999

No. 99-77

IN THE

SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,

Petitioner

v.

TONY G. TURPIN, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent

On Petition For Writ Of Certiorari To The Supreme Court of Georgia

MOTION OF THE SOUTHERN CENTER FOR HUMAN RIGHTS TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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No. 99-77

IN THE
SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,
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v.

TONY G. TURPIN, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,
Respondent

MOTION OF THE SOUTHERN CENTER FOR HUMAN RIGHTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Southern Center for Human Rights (the "Center") respectfully moves for leave to file the accompanying brief as *amicus curiae* pursuant to Rule 37.2(b) of the Rules of this Court. Petitioner's consent to the filing of this brief has been filed with the Court. Respondent has refused consent.

INTEREST OF THE SOUTHERN CENTER FOR HUMAN RIGHTS

The Center is a non-profit, public interest legal program governed by a Board of Directors. Among its missions are promoting the creation, improvement and support of indigent defense programs; achieving equal justice for all, regardless of indigence or disadvantage; and ensuring that the criminal justice system operates consistently with the requirements of the Bill of Rights.

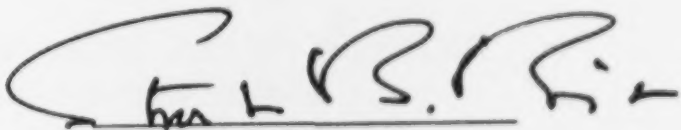
Based in Georgia, the Center has long been involved in efforts to provide counsel for indigent people facing the death penalty in post-conviction proceedings. Since its creation in 1976, lawyers employed by the Center have represented numerous individuals sentenced to death in post-conviction proceedings, recruited lawyers to provide *pro bono publico* representation to condemned people, and have provided instruction, materials and advice to lawyers who have come forward to provide such representation.

The Center has a strong interest in the fairness of state post-conviction proceedings. Due to its experience, the Center is in a unique position to inform this Court of the immense importance of the constititonal issue presented by this case.

CONCLUSION

For the above-stated reasons, the Center respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae* in the support of the position of the Petitioner.

Respectfully Submitted,



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BRIEF OF *AMICUS CURIAE* SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Southern Center for Human Rights[1] seeks to realize the goal of equal justice for all and ensure that the criminal justice system operates consistently with the requirements of the Bill of Rights. Thus, it is vitally interested in whether petitioner Exzavious Gibson and others like him are provided counsel in state post-conviction proceedings.

Because of the Center's interest and its work in the last 24 years, it is in a position to assist this Court as *amicus curiae*. The Center has seen the problem of lack of lawyers for people sentenced to death in Georgia grow well beyond the crisis stage. The Center has repeatedly observed the difference that lawyers make in capital post-conviction proceedings in Georgia, where relief has been granted as to conviction or sentence for *over half* of the individuals who have completed post-conviction review.

While lawyers employed by the Center have and continue to handle a number of capital post-conviction cases, to recruit volunteer lawyers, and to assist lawyers they and the American Bar Association's Death Penalty Representation Project have recruited, there are far more

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than *amicus curiae*, have made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief. Respondent has refused consent. A Motion for Leave to File Brief as *Amicus Curiae* is attached hereto as required by Rule 37.2(b) of the Rules of this Court.

death-sentenced individuals without counsel than lawyers willing to represent them. In this brief, the Center will provide this Court with its observations about the importance of counsel in post-conviction review in Georgia.

STATEMENT OF THE CASE

The state post-conviction hearing to determine the validity of the conviction and death sentence in the case of Exzavious Gibson, whose IQ has been measured in various tests to be between 76 and 82,[2] began as follows:

> The Court: Okay. Mr. Gibson, do you want to proceed?
>
> Gibson: I don't have an attorney.
>
> The Court: I understand that.
>
> Gibson: I am not waiving my rights.
>
> The Court: I understand that. Do you have any evidence you want to put up?
>
> Gibson: I don't know what to plead.
>
> The Court: Huh?
>
> Gibson: I don't know what to plead.
>
> The Court: I am not asking you to plead anything. I am just asking you if you have anything

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2. *Gibson v. Turpin*, 513 S.E.2d 186, 193 (Ga. 1999); *id.* at 193 (Fletcher, J., dissenting).

you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.[3]

Nevertheless, the court proceeded. After the Assistant Attorney General – who specializes in habeas corpus cases – presented the testimony of Gibson's trial attorney, Gibson was asked if he wanted to conduct cross-examination:

The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

The Court: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

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3. *Gibson v. Turpin*, No. 95-V-648 (Super. Ct. of Butts Co., Ga., Transcript of Hearing of Sept. 12, 1996, at 2-3).

> The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.[4]

Gibson tendered no evidence, examined no witnesses and made no objections. The judge denied Gibson relief. The Georgia Supreme Court, divided 4-3, refused to issue a certificate of probable cause to review the case. *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999).

This case squarely presents the question of whether the Constitution allows a state to deny Exzavious Gibson and others like him any process at all and extinguish their lives simply because they are too poor to retain an attorney.

In *Murray v. Giarratano*, 492 U.S. 1 (1989), this Court narrowly held, 5-4, that the Constitution does not require, even in capital cases, that the states provide counsel to the poor in state post-conviction proceedings. However, the death-sentenced inmate, Joseph Giarratano, was represented by counsel in that case. Justice Kennedy, a member of the majority, wrote that his vote rested in part on the fact that Virginia provided by statute for the appointment of counsel in state post-conviction proceedings, and that no death-sentenced inmate in Virginia at that time had been without legal assistance in state post-conviction proceedings. *Id.* at 14.

Georgia has no such statute. Gibson, unlike Giarratano, has limited intellectual functioning. He is only one of many death-sentenced individuals who may be forced to fend for themselves in state post-conviction proceedings that determine whether they live or die.

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4. *Id.* at 67.

SUMMARY OF ARGUMENT

Whether Georgia is free to ignore Exzavious Gibson's indigence, his mental limitations and the realities of his confinement on its death row, and extinguish his life based on the sham hearing that occurred below is a question of immense importance. It is a question that undoubtedly concerns every member of this Court, and should concern every person who takes seriously the goal of "equal justice under law" inscribed on this Court's building.

The assistance of counsel has been indispensable to the fairness and reliability of post-conviction proceedings in Georgia. As a result of representation provided by volunteer counsel, the innocent have been freed and new trials have been granted to those convicted and sentenced to death in violation of the Constitution. The many who were once condemned to die and are now free or no longer under sentence of death are living proof that lawyers are necessities, not luxuries, in state post-conviction review in Georgia.

In many cases, post-conviction counsel have made the demanding showing that the condemned were denied effective counsel, a showing that a semi-literate or mentally ill lay person could never make on his own. Many other cases in which relief has been granted have involved individuals who, like Gibson, were mentally retarded or mentally impaired and incapable of representing themselves.

While the stakes – life or death – are as high as ever, much has changed since *Giarratano*. Federal and state habeas law has become significantly more complex in the last decade. The process moves faster, as it did in Mr. Gibson's case. It has become virtually impossible for those

with limited education, limited mental ability and limited access to law books to master the law, conduct investigations, and comply with the complex rules governing post-conviction review. The question presented by this case is so fundamental to basic notions of due process and equal protection that this Court should grant certiorari to review the decision below.

ARGUMENT

LAWYERS HAVE BEEN INDISPENSABLE IN ESTABLISHING WRONGFUL AND UNCONSTITUTIONAL CONVICTIONS OR DEATH SENTENCES IN *OVER HALF* THE GEORGIA CAPITAL CASES REVIEWED IN STATE AND FEDERAL HABEAS CORPUS.

The need for the assistance of counsel in post-conviction proceedings in Georgia is most compellingly demonstrated by the people once condemned to die who are alive today because lawyers who represented them in state and federal habeas corpus proceedings showed that they were convicted or sentenced in violation of the Constitution.

Since this Court upheld Georgia's death penalty scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976), post-conviction counsel have been responsible for seeing that three innocent people who had been sentenced to death were not wrongfully executed. Lawyers representing death-sentenced inmates in post-conviction proceedings have also proven constitutional error, requiring new trials or new sentencing hearings, in *over half* of the Georgia

cases in which post-conviction review has been completed.[5]

The remarkable rate at which post-conviction relief has been granted in Georgia capital cases makes it clear that harmful constitutional error is often not remedied on direct appeal. A survey of Georgia's capital cases since 1976 conducted by *amicus* reveals that courts have granted post-conviction relief in 113 of the 221 cases in which the Georgia Supreme Court affirmed death penalties and post-conviction proceedings have been completed.[6] State courts have granted relief in 26 percent – 44 of 171 – of cases completed, and federal courts have granted relief in 65 percent – 69 of 104 – of cases in which habeas review has been completed.[7] Even in those cases where relief has been granted in the federal courts, it has almost always been based on records established during state post-conviction proceedings.

It is doubtful that the harmful errors in any of these cases would have been detected and proven in the absence of counsel. As Mississippi's highest court recognized recently:

> [T]he reality [is] that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without

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5. *See* Appendix to this brief, listing cases.

6. *Id.*

7. *Id.*

> training in the law or the mental ability to comprehend the requirements of [state habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.[8]

We review here only a few of the many Georgia capital cases in which the assistance of counsel in state post-conviction proceedings was essential to a just result.

A. Innocent People Sentenced to Death

As a result of the work done by volunteer counsel, Gary Nelson was released after spending 11 years on Georgia's death row for a crime he did not commit. Nelson's volunteer lawyers discovered that a hair found on the victim's body, which a prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison.[9] They also found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared.[10] The Georgia Supreme Court granted habeas relief and Nelson was released.[11]

Nelson, like many people condemned to die in Georgia, received only perfunctory representation from a court-appointed lawyer at his trial. The appointed lawyer,

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8. *Jackson v. State*, __ So.2d __, 1999 WL 33904, at *3 (Miss. 1999).

9. *David Lundy, Bondurant's Costly Death Appeal*, FULTON COUNTY DAILY REP., Aug. 18, 1989, at 6.

10. *Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991).

11. *Id.*

who was struggling with financial problems and a divorce, was paid at a rate of only $15 to $20 per hour.[12] His request for co-counsel was denied.[13] Even though the case against Nelson was entirely circumstantial and based on the questionable opinion of a prosecution expert linking the hair to Nelson,[14] the appointed lawyer was not provided funds for an investigator and, knowing a request would be denied, he did not seek funds for an expert.[15] Counsel, whose closing argument was only 255 words long, was later disbarred for other reasons.[16]

Jerry Banks was twice been sentenced to death[17] and the lawyer who defended him at trial abandoned him after being disbarred[18] before three volunteer lawyers obtained his release by showing that law enforcement officials had tampered with evidence and failed to reveal exculpatory evidence proving Banks' innocence.[19] Robert Wallace was acquitted at a retrial after being represented by counsel in

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12. Lundy, *supra* note 9, at 6; *see also* Affidavit of Howard A. McGlasson, Jr., at 6, 8, admitted in *Nelson v. Zant* (Super. Ct. Butts County, Ga. 1989) (No. 5387), *rev'd*, 405 S.E.2d 250 (Ga. 1991).

13. *Id.*

14. *Id.* at 6, 15.

15. *Id.* at 7-8.

16. *Lundy, supra* note 9, at 6.

17. *Banks v. State*, 235 Ga. 121, 218 S.E.2d 851 (1975); *Banks v. State*, 246 Ga. 1, 268 S.E.2d 630 (1980).

18. Michael L. Radelet et al., IN SPITE OF INNOCENCE 181 (1992).

19. *Id.* at 182-85.

state and federal post-conviction proceedings and obtaining relief.[20]

B. Denial of The Right to Counsel

In rejecting Joseph Giarratano's claim that he was entitled to counsel in state habeas corpus proceedings, this Court said:

> Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys to capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated in collateral attack.[21]

Georgia has not concentrated resources at the trial or appellate stages of capital cases. Colorable claims of ineffective assistance of counsel in capital cases have been legion, and 24 death sentences have been vacated due to ineffective representation at trial.[22] The poor quality of legal representation provided by court-appointed lawyers in Georgia was described as follows by an American Bar Association report:

> Georgia's recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no

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20. *State v. Wallace*, No. 10387 (Super. Ct. Greene County, Ga.); *Wallace v. Kemp*, 757 F.2d 1102 (11th Cir. 1985).

21. *Murray v. Giarratano*, 492 U.S. 1, 11 (1989).

22. *See* Appendix at 1a-5a. The 24 cases are indicated "IAC" and citations are provided.

> representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase.[23]

In the ten years since this Court decided *Giarratano* and the ABA issued its report, the quality of counsel in death penalty cases in Georgia has not improved. Within the last year, three people were granted relief in state post-conviction proceedings and two in federal habeas corpus after lawyers demonstrated that they were condemned to die at trials at which they had been denied effective counsel.

William Lipham's death sentence was vacated because his court-appointed lawyer "totally failed to read, review or interpret" records regarding Lipham's mental health and history of institutionalization, failed to have a mental health expert examine the records and, instead, just introduced "2500 pages of raw institutional documents" into evidence, and then urged the jury, "without any guidance, to read through the stack of papers for mitigation evidence."[24] In affirming the grant of habeas relief, the Georgia Supreme Court relied on the record developed by "Lipham's habeas counsel [who] presented the affidavits of several psychologists and psychiatrists who testified that test results contained within the institutional

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23. American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 65-66 (1990).

24. *Turpin v. Lipham*, 510 S.E.2d 32, 40, 41 (Ga. 1998).

records . . . suggest organic brain damage . . . and post traumatic stress disorder."[25]

The Georgia Supreme Court affirmed habeas corpus relief for Scott Christenson after it was shown that his court-appointed attorneys failed to investigate his "extensive history of psychiatric problems and substance abuse" and "poorly prepared" witnesses to testify in mitigation.[26] Based upon the testimony of two mental health experts presented by Christenson's volunteer post-conviction counsel, the Georgia Supreme Court concluded that "[p]sychiatric evidence may have provided the jury with an explanation for Christenson's actions" and that counsel was unconstitutionally ineffective.[27]

The evidence of mental problems presented by habeas counsel for both Lipham and Christenson is not only a basis for relief; it demonstrates that neither was capable of representing himself in state post-conviction proceedings.

Dennis Hall, an alcoholic who shot his son while intoxicated, was equally incapable of representing himself. Both his conviction and death sentence were vacated by a state habeas corpus court last year after volunteer counsel demonstrated that Hall's lawyer spent less than six hours interviewing defense witnesses in the five months prior to trial, made no investigation of his client's history of alcoholism, consulted no experts, interviewed only two of

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25. *Id.* at 41.

26. *Turpin v. Christenson*, 497 S.E.2d 216, 224, 226 (Ga. 1998).

27. *Id.* at 225, 229.

the 25 witnesses the state intended to call, and failed to object to inadmissible evidence.[28]

These cases, as well as two in which the federal courts have granted relief due to ineffective representation at Georgia capital trials,[29] are only the most recent examples of breakdowns in Georgia's adversary system.

Like Exzavious Gibson, James Pitts was a person of limited intellectual functioning. Although Georgia law prohibits the execution of the mentally retarded[30] and Pitts' court-appointed counsel had the results of examinations by two mental health experts which showed that Pitts had an IQ of 70 and was mentally retarded, counsel failed to present this evidence because they erroneously believed they could not take advantage of a "guilty but mentally retarded" defense because Pitts' IQ was not below 55.[31] Post-conviction counsel obtained habeas corpus relief for Pitts by presenting evidence of his mental limitations and the deficient performance of the lawyers.

Two African-Americans condemned to death at trials at which they were represented by the elderly Imperial Wizard of the Georgia Ku Klux Klan were granted new

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28. *Hall v. Turpin*, No. 95-V-651 (Super. Ct. of Butts County, Ga., Order of Oct. 8, 1998, at 4-6, 24-36).

29. *Collier v. Turpin*, 177 F.3d. 1184 (11th Cir. 1999); *Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998).

30. Off. Code Ga. Ann. § 17-7-131 (1998).

31. *Zant v. Pitts*, 436 S.E.2d 4, 5 (Ga. 1993).

trials in state post-conviction proceedings.[32] In the case of Eddie Lee Ross, a seriously mentally-ill man, the Imperial Wizard argued that Ross did not commit the crime while another lawyer appointed to defend Ross presented a mental health defense that acknowledged Ross's participation in the crime.[33] In the case of Aden Harrison, the Wizard slept through parts of the trial.[34]

In another case, a court-appointed lawyer failed to raise a meritorious issue because he was unaware of the law and referred to his client as a "nigger" in closing argument.[35] Another ineffective lawyer had been a member of the bar for only six months prior to his appointment to defend a capital case.[36] Another conceded guilt in closing argument at the guilt phase.[37] One lawyer was not even present during portions of the trial, and cross-examined one witness whose direct examination he had missed because he was parking his

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32. *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990); *Harrison v. Zant*, No. 88-V-1640 (Super. Ct. of Butts County, Ga., Order of Oct. 5, 1990), *aff'd*, 402 S.E.2d 581 (Ga. 1991).

33. *Ross v. Kemp*, 393 S.E.2d at 245.

34. *Harrison v. Zant*, No. 88-V-1640, (Super. Ct. of Butts County, Ga., Order of Oct. 5, 1990 at 2), *aff'd*, 402 S.E.2d 581 (Ga. 1991).

35. *Goodwin v. Balkcom*, 684 F.2d 794, 817-20 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983).

36. *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985), *cert. denied*, 474 U.S. 1026 (1985).

37. *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983).

car.[38] Habeas relief was granted in another case where the lawyer failed to provide "even a modicum of professional assistance at any time" during the trial.[39] Numerous cases have been reversed because counsel failed to present any evidence in mitigation.[40]

Thus, it is clear that Georgia has not concentrated its resources in providing competent counsel at trial in order to avoid colorable claims of ineffective assistance, as suggested by the plurality in *Giarratano*.[41] Indeed, even in many cases in which courts found lawyers not to fall below the highly deferential standard of *Strickland v. Washington*[42] and executions were carried out, lawyers for death-sentenced inmates presented colorable claims of ineffective assistance.

For example, James Messer was executed following a trial at which his lawyer presented no opening statement, no defense case, conducted cursory cross-examination,

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38. *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), *cert. denied*, 469 U.S. 870 (1984).

39. *Young v. Zant*, 677 F.2d 792, 795 (11th Cir. 1982).

40. *See, e.g., Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998); *Baxter v. Thomas*, 43 F.3d 1501 (11th Cir. 1995), *cert. denied*, 516 U.S. 946 (1995); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992); *Thomas v. Kemp*, 796 F.2d 1322, 1324-25 (11th Cir. 1986), *cert. denied*, 479 U.S. 996 (1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *cert. denied*, 474 U.S. 998 (1985); *Johnson v. Kemp*, 615 F. Supp. 355, 364 (S.D. Ga. 1985), *aff'd without opinion*, 781 F.2d 1483 (11th Cir. 1986); *Zant v. Hamilton*, 307 S.E.2d 667 (Ga. 1983).

41. *Giarratano*, 492 U.S. at 11.

42. 466 U.S. 668, 689 (1984).

made no objections, emphasized the horror of the crime in a brief closing at the guilt phase and presented a wholly inadequate mitigation case.[43] William Mitchell was executed even though his attorney made no attempt to contact any mitigating witnesses, made no inquiries into his client's academic, medical, or psychological history, and thus failed to present any case in mitigation.[44] John Young was executed even though his lawyer's performance at trial suffered because the lawyer was dependent on amphetamines and other drugs, physically exhausted, and distracted by marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business.[45] Soon after Young's trial, his lawyer plead guilty to state and federal drug charges and joined Young at the county jail.[46]

Even though Messer, Mitchell and Young were ultimately unsuccessful in overcoming the immense burden that *Strickland* places on a poor person who has the misfortune of being assigned an inept lawyer, they presented substantial, colorable claims that their legal representation fell below constitutional standards. They were entitled to present their substantial claims of denial

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43. *Messer v. Kemp*, 760 F.2d 1080, 1093-97 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 474 U.S. 1088 (1986); *Messer v. Kemp*, 474 U.S. 1088, 1089-90 (1986) (Marshall, J., dissenting from denial of certiorari).

44. *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari).

45. Affidavit of Charles Marchman, Jr. at 1-5, *Young v. Kemp*, No. 85-98-2-MAC (M.D. Ga. 1985).

46. *Id.* at 7.

of the most fundamental right, but they could do so only with the assistance of post-conviction counsel.

It is inconceivable that any of the many people who have been granted relief because of ineffective assistance of counsel could have represented themselves and shown deficient and prejudicial performance by counsel, as required by *Strickland*. It was only after capable volunteer lawyers investigated the cases and presented evidence of the ineffectiveness of trial counsel that they were granted new trials or sentencing. Remarkably, not a single person discussed in this section who was granted relief because of ineffective assistance of counsel is under death sentence today.[47] Competent counsel does make a difference both at trial and in post-conviction proceedings.

It is equally inconceivable that Exzavious Gibson, with limited intellectual functioning and confined to a cell on death row, could have prevailed on his claim of ineffective assistance of counsel in the sham hearing that occurred in the Superior Court below.

C. The Mentally Retarded

Just as it is unlikely that those deprived of their Sixth Amendment right to counsel at trial could, if left to fend for themselves, establish the constitutional violation in post-conviction proceedings, it is similarly improbable that a mentally retarded person – a person like Exzavious Gibson, whose IQ has been found to be between 76 and 82 – could prove his own mental retardation in state habeas corpus proceedings.

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47. NAACP Legal Defense & Educational Fund, *Death Row USA*, at 29-30 (April 1, 1999) (listing those under death sentence in Georgia).

Georgia law has prohibited the execution of the mentally retarded since 1988.[48] The Georgia Supreme Court held in 1989 that execution of the mentally retarded violated the Georgia Constitution and provided that those sentenced to death prior to the statute's enactment were entitled to a hearing and could not be put to death if found mentally retarded.[49]

Since 1989, 24 cases have been remanded from the state habeas court to courts of conviction for hearings on whether the condemned inmate was mentally retarded.[50] In all of those cases, lawyers presented evidence of the limited intellectual functioning of the condemned individual. Left to proceed *pro se*, these mentally limited people would be wholly incapable of presenting their claims and helpless to present evidence. They would surely be denied relief and executed even though Georgia law prevents their execution.

D. Other Constitutional Violations

It stretches credulity to think that Robert Strickland, suffering from a "psychotic disorder," with an IQ of 73 and "unaware of the proceedings against him and totally unable to communicate on matters relating to the crime or pending trial," could have demonstrated in post-conviction proceedings that he was mentally incompetent at the time

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48. Off. Code Ga. Ann. § 17-7-131 (1988).

49. *Fleming v. Zant*, 286 S.E.2d 339 (Ga. 1989).

50. The cases are listed in the Appendix to this Brief at 1-2. The 24 cases are indicated "MR Remand" and citations are provided.

of his capital trial.[51] Or that Tony Amadeo, condemned to die at age 18, could have presented in state habeas proceedings, as did his lawyers, a handwritten memorandum from the prosecutor advising jury commissioners to underrepresent blacks and women in the jury lists.[52] Or that Michael Berryhill could have presented evidence of the underrepresentation of women in the pool from which his jury was selected.[53]

Amadeo, Berryhill, Strickland and many others whose constitutional rights were vindicated in habeas corpus proceedings were not resentenced to death. Their cases are representative of the many, set out in the Appendix to this brief, that have been marred by at least one harmful violation of the United States Constitution, where relief was available only in post-conviction proceedings. In each, it is highly unlikely that any relief would have been granted had the petitioner been left on his or her own to recognize the legal claims, to develop and present evidence supporting them, and to navigate the complex and stormy waters of habeas corpus law to get a ruling on the merits.

Justice Kennedy observed in *Giarratano* that this Court has given the states "wide discretion" in deciding how to provide access to the courts for the poor.[54] Some states – including Georgia – have proven unworthy of the trust placed in them by this Court. Over 15 years ago a

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51. *Strickland v. Frances*, 738 F.2d 1542, 1544-56, 1548 (11th Cir. 1984).

52. *Amadeo v. Zant*, 486 U.S. 214 (1988).

53. *Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988).

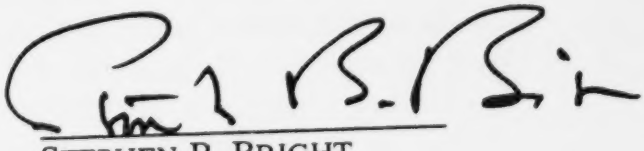
54. 492 U.S. at 14 (Kennedy, J., concurring), quoting *Bounds v. Smith*, 430 U.S. 817, 833 (1977).

petitioner condemned to die in Georgia was unable to present testimony at his state habeas hearing because Georgia did not even provide for payment of witness fees of $10.[55] Georgia does no better today. Its state post-conviction proceedings are available only to those with money or those fortunate enough to receive *pro bono* legal assistance. Others, like Gibson, may, simply as a result of their poverty, be denied post-conviction review and be executed even if convicted and sentenced to death in violation of the Constitution.

CONCLUSION

This nation prides itself in its commitment to due process and equal justice under law. This Court should grant certiorari to determine whether those fundamental principles do not at least require that a bewildered, mentally limited man be given a fair chance to find a *pro bono* lawyer before being forced into a hearing which may determine whether he lives or dies.

Respectfully Submitted,



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55. *Thomas v. Zant*, 697 F.2d 977, 988 n.14 (11th Cir. 1983).

APPENDIX

STATE HABEAS CORPUS RELIEF GRANTED
PERSONS SENTENCED TO DEATH
IN GEORGIA SINCE 1973
(cases that have been finally resolved)

Total individuals granted relief: 43

Number granted relief based on finding of ineffective assistance of counsel: 8
[designated "IAC" in listing below]

Number remanded for determination of whether condemned inmate was mentally retarded: 24
[designated "MR Remand" in listing below]
[*see Flemming v. Zant*, 386 S.E.2d 339 (Ga. 1989)]

Allen, S. (2nd), Butts County Super. Ct. No. 90-V-3326 (MR Remand)
Beck, 386 S.E.2d 349 (Ga. 1989) (MR Remand)
Birt, Butts Super. Ct. No. 78-74 (IAC)
Childs, Butts Super. Ct. No. 88-V-1405 (MR Remand)
Christenson, 497 S.E.2d 216 (Ga. 1998) (IAC)
Cohen, Butts Super. Ct. No. 89-V-2347 (MR Remand)
Collins, Butts Super. Ct. No. 90-V-3211 (MR Remand)
Cury, 371 S.E.2d 647 (Ga. 1988) (IAC)
Dampier, Butts Super. Ct. No. 5617
Davis, G., Butts Super. Ct. No. 86-V-855 (MR Remand)
Finney (2d), Butts Super. Ct. No. 86-V-597 (MR Remand)
Flemming (2d), 386 S.E.2d 339 (Ga. 1989) (MR Remand)
Floyd, 311 S.E.2d 828 (Ga. 1984)
Foster, Butts Super. Ct. No. 89-V-2275 (MR Remand)
Gaddis, 279 S.E.2d 219 (Ga. 1981)
Gates, 89-V-2468 (MR Remand)
Hamilton, 307 S.E.2d 667 (Ga. 1983) (IAC)
Harris, 253 S.E.2d 707 (Ga. 1979)
Harrison, 402 S.E.2d 518 (Ga. 1991) (IAC)
Hill, T., 301 S.E.2d 269 (IAC)
Holiday, Butts Super. Ct. No. 89-V-2021 (MR Remand)
Jarrell (1st), 284 S.E.2d 17 (Ga. 1981)
Jarrells, Butts Super. Ct. No. 90-V-3277 (MR Remand)
Krier, DeKalb Super. Ct. No. 83-2501

Lee, Jesse, Butts Super. Ct. No. 90-V-2616 (MR Remand)
Legare (1st), 455 U.S. 914 (1982)
Lipham, 510 S.E.2d 32 (Ga. 1998) (IAC)
Miller, Butts Super. Ct. No. 94-V-81 (MR Remand)
Morrison, Butts Super. Ct. No. 89-V-2309 (MR Remand)
Nelson, 405 S.E.2d 250 (Ga. 1991)
Pattillo, 417 S.E.2d 139 (Ga. 1992) (MR Remand)
Peek, Butts Super. Ct. No. 86-V-830 (MR Remand)
Pitts, 436 S.E.2d 4 (Ga. 1993) (IAC) (MR Remand)
Pruitt, M.A., Butts Super. Ct. No. 92-V-205 (MR Remand)
Pryor, Butts Super. Ct. No. 3826
Pulliam, Butts Super. Ct. No. 77-358
Redd (2d), Butts Super. Ct. No. S90-H0030 (MR Remand)
Rogers (2d), Butts Super. Ct. No. 94-V-661 (MR Remand)
Ross, E., 393 S.E.2d 244 (Ga. 1990) (IAC)
Spencer (2d), Butts Super. Ct. No. 91-V-4040 (MR Remand)
Todd, __ S.E.2d __, S99A0431, S99X0449 (Ga. July 14, 1999)
Walker, R., Butts Super. Ct. No. 90-V-2984 (MR Remand)
Wilson, W., Butts Super. Ct. No. 90-V-2935 (MR Remand)

STATE HABEAS RELIEF DENIED PERSONS SENTENCED TO DEATH IN GEORGIA SINCE 1973

(cases finally resolved in state court)

Total: 128

69 are listed under "Individuals sentenced to death in Georgia who have received federal habeas corpus relief since 1973," which follows.

35 are listed under "Individuals sentenced to death in Georgia who have been denied federal habeas corpus relief since 1973," which follows.

The cases of the remaining 24 individuals are still pending in federal review.

FEDERAL HABEAS CORPUS RELIEF GRANTED PERSONS SENTENCED TO DEATH IN GEORGIA SINCE 1973
(cases finally resolved)

Total: 69

Number granted relief based on finding of ineffective assistance of counsel: 16
[designated "IAC" in listing below]

Alderman (1st), 695 F.2d 124 (5th Cir. Unit B 1983)
Amadeo, 486 U.S. 214 (1988)
Baker, No. C82-2299A (N.D. Ga. 1984) (unpublished)
Baxter, 45 F.3d 1501 (11th Cir. 1995) (IAC)
Berryhill (1st), 640 F.2d 382 (5th Cir. 1981)
Berryhill (2d), 858 F.2d 633 (11th Cir. 1988)
Blake, 758 F.2d 523 (11th Cir. 1985) (IAC)
Blanks, No. CV-290-186 (S.D. Ga. 1991) (unpublished)
Bowen (2d), 832 F.2d 546 (11th Cir. 1987)
Brooks, 762 F.2d 1383 (11th Cir. 1985) (en banc), 809 F.2d 700 (1987) (en banc)
Brown, J.W. (1st), No. 88-CV-228-RCF (N.D. Ga. 1988) (unpublished)
Brown, N., No. CV-188-027 (S.D. Ga. 1989) (unpublished)
Burden, 24 F.3d 1298 (11th Cir. 1994) (attorney conflict of interest)
Buttrum, J., 721 F. Supp. 1268 (N.D. Ga. 1989)
Cervi, 855 F.2d 702 (11th Cir. 1988)
Coleman, W., 778 F.2d 1487 (11th Cir. 1986)
Collier, 177 F.3d 1184 (11th Cir. 1999) (IAC)
Corn, 837 F.2d 1474 (11th Cir. 1988)
Cunningham, J., 928 F.2d 1006 (11th Cir. 1991) (IAC)
Davis, C. (2d), 752 F.2d 1515 (11th Cir. 1985)
Davis, F. (2d), 829 F.2d 1522 (11th Cir. 1987) (IAC)
Davis, J.M., 36 F.3d 1538 (11th Cir. 1994)
Dick, 833 F.2d 1448 (11th Cir. 1987)
Dix, 763 F.2d 1207 (11th Cir. 1985)
Dobbs, 142 F.3d 1383 (11th Cir. 1998) (IAC)
Douthit, No. C81-2310A (N.D. Ga. 1984) (unpublished)
Drake, 762 F.2d 1449 (11th Cir. 1985) (en banc)

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Wallace, 757 F.2d 1102 (11th Cir. 1985)
Westbrook (1st), 743 F.2d 764 (11th Cir. 1984) (IAC)
Williams, A., 87 F.3d 1204 (11th Cir. 1996) (IAC)
Wilson, J., 777 F.2d 621 (11th Cir. 1985)
Young, C., 677 F.2d 792 (11th Cir. 1982) (IAC)

FEDERAL HABEAS CORPUS RELIEF DENIED
PERSONS SENTENCED TO DEATH
IN GEORGIA SINCE 1973
(cases finally resolved)

Total: 35
Number executed: 23

Alderman (2d), 22 F.3d 1541 (11th Cir. 1994)
Bowden, 733 F.2d 740 (11th Cir. 1984); 767 F.2d 761 (11th Cir. 1985); 774 F.2d 1494 (11th Cir. 1988) (executed)
Burger, 483 U.S. 776 (1987); 984 F.2d 1129 (11th Cir. 1993) (executed)
Cape, 741 F.2d 1287 (11th Cir. 1984)
Cargill, 120 F.3d 1366 (11th Cir. 1997) (executed)
Chenault, 581 F.2d 444 (5th Cir. 1978)
Collins, 728 F.2d 1322 (11th Cir. 1984); 892 F.2d 1505 (11th Cir. 1990)
Devier, 3 F.3d 1445 (11th Cir. 1993) (executed)
Felker, 52 F.3d 907 (11th Cir. 1995); 518 U.S. 651 (1996) (executed)
Flemming, 748 F.2d 1435 (11th Cir. 1984); 837 F.2d 940 (11th Cir. 1989)
Gates, 863 F.2d 1492 (11th Cir. 1989)
Green (2d), 738 F.2d 1529 (11th Cir. 1984) (executed)
Hance (2d), 981 F.2d 1180 (11th Cir. 1993) (executed)
High, 916 F.2d 1507 (11th Cir. 1990)
Ingram, 26 F.3d 1047 (11th Cir. 1994) (executed)
Lonchar, 978 F.2d 637 (11th Cir. 1992); 58 F.3d 590 (11th Cir. 1995) (executed)
McClesky, 499 U.S. 467 (1991); 481 U.S. 279 (1987) (executed)
McCorquodale, 721 F.2d 1493 (11th Cir. 1983) (executed)

Messer, 760 F.2d 1080 (Cir. 1985); 831 F.2d 946 (11th Cir. 1987) (executed)
Mitchell, 762 F.2d 886 (11th Cir. 1985); 827 F.2d 1433 (11th Cir. 1987) (executed)
Moore, W. N., 716 F.2d 1511 (11th Cir. 1983); 885 F.2d 1497 (11th Cir. 1989)
Mulligan, 771 F.2d 1436 (11th Cir. 1985); 818 F.2d 746 (11th Cir. 1987) (executed)
Peek, 784 F.2d 1479 (11th Cir. 1986) (en banc)
Rogers, 13 F.3d 384 (11th Cir. 1994)
Smith, J.E., 660 F.2d 573 (5th Cir. 1981); 671 F.2d 858 (5th Cir. Unit B 1982); 715 F.2d 1459 (11th Cir. 1983) (executed)
Solomon, 735 F.2d 395 (11th Cir. 1984); 888 F.2d 1579 (1989) (executed)
Stanley, 697 F.2d 955 (11th Cir. 1983); 737 F.2d 921 (11th Cir. 1984) (executed)
Stephens, A., 462 U.S. 862 (1983); 716 F.2d 276 (5th Cir. Unit B 1983); 722 F.2d 628 (11th Cir. 1983) (executed)
Stevens, T., 968 F.2d 1076 (11th Cir. 1992) (executed)
Tucker, R., 762 F.2d 1496 (11th Cir. 1985) (en banc); 776 F.2d 1487 (11th Cir. 1985); 818 F.2d 749 (11th Cir. 1987) (executed)
Tucker, W., 802 F.2d 1293 (11th Cir. 1986) (en banc); 819 F.2d 978 (11th Cir. 1987) (executed)
Waters, 46 F.3d 1506 (11th Cir. 1995) (en banc)
Williams, G., 846 F.2d 1276 (11th Cir. 1988)
Willis, 838 F.2d 1510 (11th Cir. 1988) (executed)
Young, J., 727 F.2d 1489 (11th Cir. 1984); 758 F.2d 514 (11th Cir. 1985) (executed)

INDIVIDUALS UNDER SENTENCE OF DEATH IN GEORGIA WITH CASES PENDING IN STATE OR FEDERAL COURTS WITHOUT FINAL RESOLUTION

Total: 73
(not listed)

Supreme Court, U.S.
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No. 99-77

In The

Supreme Court of the United States

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

FREDRICK J. HEAD, Warden, Georgia Diagnostic and Classification Center,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

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CAPITAL CASE
QUESTION PRESENTED

Should this Court decline to grant certiorari to review a death row inmate's case where:

(1) the inmate filed his habeas corpus petition, after waiting almost four years from the time his conviction became final and with no execution order outstanding, in a maneuver designed to avoid new capital state habeas corpus timelines,

(2) the habeas corpus petition was prepared by the state-funded Resource Center,

(3) the Resource Center filed motions in the habeas corpus court on behalf of the inmate,

(4) the Resource Center nevertheless refused the habeas corpus court's requests to enter a formal appearance as the inmate's counsel,

(5) every death row inmate in the state both before and since Petitioner has been represented in state habeas corpus by the Resource Center, defender organizations, or pro bono counsel; and

it is therefore obvious that the inmate's "right to counsel" claim was contrived by the Resource Center?

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STATEMENT OF THE CASE

Due to the factually inaccurate and misleading nature of Petitioner's Question Presented and Statement of the Case, an understanding of the true procedural history of this case is critical to this Court's determination whether this case warrants the exercise of its certiorari jurisdiction.

This case does not involve a "borderline mentally retarded" death row inmate, a death row inmate forced to file a habeas corpus petition without the assistance of counsel, or habeas corpus proceedings which were the inmate's "only opportunity to prove fundamental constitutional claims."

To the contrary, this case involves a death row inmate who, after waiting four years from the time his conviction became final and with no execution order outstanding, contrived to file a habeas corpus petition prepared by the state-funded Resource Center in a maneuver designed to circumvent new capital habeas corpus timelines.

The procedural history of this case is as follows:

Petitioner, Exzavious Lee Gibson, was tried June 11 through June 14, 1990 for the malice murder and armed robbery of Douglas Coley.[1] The jury convicted Petitioner

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[1] The Supreme Court of Georgia on direct appeal found that Petitioner had stabbed, slashed or cut the victim some thirty-nine (39) times with such force that he broke the knife blade in the victim's neck. Petitioner then robbed the victim of almost $500 in store receipts and the victim's personal wallet as the victim operated his family-owned grocery store. Petitioner first told police he had killed the victim to get money for drugs.

of malice murder and armed robbery. Following the sentencing phase of trial, the jury found the existence of two statutory aggravating circumstances: that the murder was committed while Petitioner was engaged in the commission of the capital felony of armed robbery pursuant to O.C.G.A. § 17-10-30(b)(2) and that the offense of murder was outrageously or wantonly vile, horrible, and inhuman in that it involved aggravated battery to the victim pursuant to O.C.G.A. § 17-10-30(b)(7). The jury returned a death sentence against Petitioner, and Petitioner was sentenced to death for malice murder. Petitioner received a sentence of life imprisonment for armed robbery.

Petitioner's motion for new trial was denied on January 4, 1991. Thereafter, Petitioner appealed to the Supreme Court of Georgia, which affirmed his convictions and sentences on June 10, 1991. *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991). This Court denied certiorari on February 24, 1992. *Gibson v. Georgia*, 502 U.S. 1101 (1992), *reh'g denied*, 503 U.S. 999 (1992).

Almost four years later, on December 20, 1995, with no execution date pending and in the absence of any prompting by the State, Petitioner voluntarily filed a state habeas corpus petition which had been prepared by the Georgia Appellate Practice and Educational Resource

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In a second statement, Petitioner claimed that the victim had lectured him about his behavior and use of profanity during an earlier visit by Petitioner to the store on the day of the murder, and that Petitioner wanted to "hurt" the victim because he "didn't like him." *Gibson v. State*, 261 Ga. 313, 313-314, 404 S.E.2d 781, 783-784 (1991).

Center (hereinafter the "Resource Center") on Petitioner's behalf. (App. at 1). Petitioner, through counsel, later admitted, "The purpose of filing [December 20,] 1995 was to avoid the expedited procedures under [Georgia Uniform Superior Court] Rule 44 that took effect for petitions filed on or after January 1, 1996." (Petitioner's Application for Certificate of Probable Cause to Appeal filed in the Supreme Court of Georgia, p. 5). Petitioner's petition was one of eleven prepared by the Resource Center and ostensibly filed "pro se" on December 20, 1995 in a calculated effort to avoid application to those cases of the new Uniform Superior Court Rule 44 scheduling timelines for first-time capital habeas corpus petitions.[2] *Id.*

Respondent[3] filed his Return and Answer and thereafter moved for entry of a scheduling order, advocating adoption by the habeas corpus court of a scheduling order which would be in accord with the timelines which had recently been promulgated by the Superior Court Judges Council, set forth in Uniform Superior Court Rule 44, and adopted by the Supreme Court of Georgia on December 15, 1995, as contemplated by O.C.G.A.

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[2] As is apparent from the circumstances surrounding Petitioner's voluntary and unprompted filing of his habeas corpus petition, Petitioner was not *forced* to proceed through state habeas corpus without counsel, and Petitioner's assertions to the contrary are both misleading and inaccurate.

[3] The Warden of the Georgia Diagnostic and Classification Prison is now Fredrick J. Head, who replaced former Warden Tony Turpin. Respondent has substituted Warden Head as the proper party Respondent pursuant to United States Supreme Court Rule 35.3.

§ 9-14-47.1(c), to govern first-time capital state habeas corpus petitions filed on or after January 1, 1996. Respondent acknowledged in his brief in support of the motion that the petition in the instant case had been filed prior to January 1, 1996, but suggested that the habeas corpus court exercise its inherent power to control the orderly progress of litigation pending before it by entering a scheduling order adopting a timetable for the case which would be in accord with the timelines set forth in Uniform Superior Court Rule 44. (App. at 30). On February 8, 1996, stating its purpose to control the orderly progress of litigation and facilitate a fair and orderly resolution of the issues, the habeas corpus court entered a scheduling order establishing deadlines for the filing of motions by the parties and for any amendments to the petition in accordance with the guidelines set forth in Uniform Superior Court Rule 44.[4] (App. at 35).

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[4] Petitioner's claim in his Statement of the Case that the habeas corpus court held that the new Uniform Superior Court Rule applied to Petitioner's case is incorrect. A review of the habeas corpus court's order confirms that the court in its discretion merely entered a scheduling order setting scheduling deadlines for Petitioner's case which were in accord with the timetables contemplated by the new Uniform Superior Court Rule. (App. at 35). Petitioner's assertion in his Statement of the Case that he was given four days to file pretrial motions and approximately one month to amend his petition is also incorrect. Petitioner was given ten days from the date the scheduling order was signed (and two months from the time his petition had been filed) to file motions and was given over two months from the date of the scheduling order to amend his petition. Further, Petitioner was eventually given almost nine months from the filing of his petition before his case was called for an evidentiary hearing. (Pet. App. at A91). Under the new

Although it was the Resource Center which prepared and filed the initial petition in this case on Petitioner's behalf, the Resource Center steadfastly refused to enter a formal appearance as counsel in Petitioner's case. Instead, during the months of February, March, April, May, June, July, and August of 1996, when the Resource Center could have been preparing Petitioner's case for a hearing, Resource Center attorney Ms. M. Elizabeth Wells filed six (6) separate motions as "amicus curiae" counsel seeking to postpone indefinitely the progress of Petitioner's case.

The Resource Center cited as the basis for such a postponement the fact that Petitioner was not represented by counsel, (Record Entry Numbers 10, 15, 18, 21, 23, and 24, hereinafter "R. ___"); however, Petitioner's lack of representation was a circumstance which Petitioner and the Resource Center themselves had contrived by the voluntary and unprompted filing of the habeas corpus petition. Instead of securing counsel and then filing a habeas corpus petition, Petitioner opted to file his petition despite the lack of a formal entry of appearance by counsel in a maneuver designed to avoid application of new scheduling timelines which were to govern first-time capital habeas corpus petitions filed on or after January 1, 1996.

In every capital state habeas corpus case both before and since Petitioner's, death row state habeas corpus litigants have been represented by the state-funded

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Uniform Superior Court Rule, his case would have been called for an evidentiary hearing within six months after the filing of the petition. (Pet. App. at A80).

Resource Center,[5] by defender organizations, or by pro bono counsel.[6] Additionally, Georgia has a system of institutional lawyers similar to the Virginia system found to be constitutionally satisfactory in *Murray v. Giarratano*, 492 U.S. 1 (1989), who contract with Georgia's prisons to provide legal assistance and representation to inmates. These institutional lawyers have been and remain available to represent death row inmates, including Petitioner, in their habeas corpus litigation. *See, e.g., State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980) (App. at 38). However, the services of these institutional lawyers were not utilized in Petitioner's case.

The habeas corpus court initially scheduled an evidentiary hearing for August 22, 1996, a date eight months subsequent to the filing of the petition. (R. 19). However, at the oral request of Resource Center attorney Ms. Wells during a telephone conference among the habeas corpus court, counsel for the Respondent Warden, and the Resource Center acting on Petitioner's behalf, the habeas corpus court postponed the evidentiary hearing until September 12, 1996. (R. 27).

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[5] At the time, $300,000.00 in state funds were appropriated annually to the Resource Center to assist volunteer counsel in the representation of capital state habeas corpus petitioners and to directly represent those petitioners. 1995 Ga. Laws 1082, 1085; 1996 Ga. Laws 1529, 1532. Currently, $500,000.00 in state funds are appropriated annually for that purpose. 1999 Ga. Laws 1071, 1074.

[6] Petitioner's inflammatory suggestion in his Statement of the Case that "shocking" cases are "accumulating in [the] wake" of the Supreme Court of Georgia's opinion in *Gibson v. Turpin* is both unsupported and untrue.

When the case was called for a hearing on September 12, 1996, Resource Center attorney Ms. Wells was present in the courtroom and on several occasions during the proceedings addressed the Court on Petitioner's behalf. (Pet. App. at A94-A105, A114, A145-A146). However, despite the habeas corpus court's promise to consider all the motions anew if Ms. Wells would enter an appearance on Petitioner's behalf, Ms. Wells refused the court's repeated entreaties, demanding to know in advance what the court's ruling on additional time would be before she would enter an appearance. When the court refused to pre-announce what his reconsidered rulings would be, Ms. Wells declined to enter her appearance, but remained in the courtroom outside the bar, and the habeas corpus hearing proceeded.[7] (*Id.* at A94-A104).

On March 11, 1997, the habeas corpus court entered an order denying Petitioner habeas corpus relief. The court found as a matter of fact in its final order that "given Petitioner's demeanor and his statements at the evidentiary hearing, [ ] Petitioner made a conscious choice not to proceed with his case at the evidentiary

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[7] Respondent disputes Petitioner's assertions in his Statement of the Case that Petitioner's case was "pushed" to an evidentiary hearing (almost nine months after the filing of his petition) before counsel "could be found" to represent him and his suggestion that "good faith efforts to secure counsel" were underway. Petitioner has provided no support for his assertions that counsel could not be found to represent him despite good faith efforts, and Respondent seriously doubts the credibility of this assertion, given the availability of the Center for Prisoners' Legal Assistance, Inc., the successor organization to the Prisoner Legal Counseling Project discussed in *State v. Davis, supra*, 269 S.E.2d 461 (*see* App. at 38), to take Petitioner's case.

hearing."[8] (Pet. App. at A35). The habeas corpus court relied upon this Court's decisions in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), *Murray v. Giarratano, supra*, 492 U.S. 1, and *Bounds v. Smith*, 430 U.S. 817 (1977), and upon the State of Georgia's framework for the litigation and review of capital cases in ruling that Petitioner was not entitled to counsel under the federal constitution in his capital state habeas corpus proceeding. (Pet. App. at A35-A38).

In ruling on the claims in the habeas corpus petition, the habeas corpus court considered the evidence before it, which included the transcript of the trial court proceedings in Petitioner's criminal case, and found that Petitioner's attorney performed reasonably in his representation of Petitioner and that no prejudice existed from any possible errors by counsel. The court denied Petitioner's claim of ineffective assistance of counsel and his other claims for habeas corpus relief.[9] (*Id.* at A31-A70.)

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[8] Respondent disputes Petitioner's assertion in his Statement of the Case and elsewhere in the Petition for Certiorari that Petitioner is "borderline mentally retarded." While Petitioner tested in the "Borderline Range of Intelligence" on a defense I.Q. test prior to trial, the defense psychologist concluded that Petitioner was not putting forth his best effort on the test, that his I.Q. was probably "at least five or six points higher," and that "he's certainly not retarded." Further, Petitioner scored in the 80's on the prior I.Q. test given by the court-appointed psychologist, who reported that Petitioner fell into the "Average Range of Intelligence." (App. at 43, 46, 55, 57; *see also* App. at 62, 64, 65, 66).

[9] Respondent disputes Petitioner's assertions in his Statement of the Case that Respondent engaged in "improper questioning" of Petitioner's trial counsel or of Petitioner at the

Petitioner is incorrect in his representation, made throughout his Petition for Certiorari, that "[i]neffective assistance claims cannot be raised on direct review in Georgia, and must be raised for the first time in state habeas." (Petition for Certiorari, p. 10). Under Georgia law, state habeas corpus is not a litigant's first opportunity to raise an ineffective assistance of trial counsel claim.

Although Petitioner proceeded with his same trial counsel in his motion for new trial and direct appeal proceedings, a capital litigant in Georgia is free to secure new counsel for his motion for new trial and direct appeal, a stage at which he is constitutionally entitled to counsel, and may litigate the claim of ineffective assistance of trial counsel at that time, instead of holding that claim until the collateral post-conviction stage. In fact, Georgia's jurisprudence encourages early litigation of claims of ineffective assistance of counsel, within the framework of the criminal case, when the capital litigant remains constitutionally entitled to representation by compensated counsel and to reasonable funds for litigation. The Supreme Court of Georgia has instructed:

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habeas corpus evidentiary hearing. The questioning of trial counsel was not objectionable because Petitioner's claims of ineffective assistance against his former counsel operated as a waiver of attorney-client privilege. The questioning of Petitioner was not objectionable as both Petitioner and the Resource Center maintained that the Resource Center attorneys were not acting as Petitioner's counsel in his habeas corpus proceedings; therefore, Petitioner was estopped from asserting a claim of attorney-client privilege with regard to communications between himself and Resource Center attorneys.

> It is a requisite of a sound system of criminal justice, serving alike the proper ends of defendants and of the public, that any contention concerning the violation of the constitutional right of counsel should be made at the earliest practicable moment.

Thompson v. State, 257 Ga. 386, 359 S.E.2d 664 (1987) (quoting *Smith v. State*, 255 Ga. 654, 655-656, 341 S.E.2d 5 (1986)). *See also White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991); *Glover v. State*, 266 Ga. 183, 465 S.E.2d 659 (1996) (recognizing as "axiomatic" the rule that ineffective assistance of trial counsel must be raised at "the earliest practicable moment," and encouraging early litigation of ineffective assistance of trial counsel claims).

Contrary to Petitioner's suggestions throughout his Petition for Certiorari, Petitioner could have secured new counsel at the motion for new trial stage of his criminal case, raised and engaged in evidentiary development of an ineffective assistance of trial counsel claim in his motion for new trial, and sought review of the ineffective assistance of trial counsel issue on direct appeal. State habeas corpus was not Petitioner's first opportunity to have raised an ineffective assistance of trial counsel claim.

On March 20, 1997, nine days after the entry of the habeas corpus court's order denying habeas corpus relief, Petitioner filed his Notice of Appeal in the Superior Court of Butts County. That same day, the law firm of King & Spalding entered its appearance in the Supreme Court of Georgia on Petitioner's behalf. On May 27, 1997, King & Spalding attorneys filed Petitioner's Application for a Certificate of Probable Cause to Appeal the habeas

corpus court's order denying habeas corpus relief.[10] Respondent filed his "Response to Application for Certificate of Probable Cause to Appeal," (*see* App. at 67), asserting that the issuance of a Certificate of Probable Cause to Appeal was not warranted in this case.

The representation by Petitioner in his Statement of the Case that "the issues were fully addressed in the substantial briefs submitted by the parties," (Petition for Certiorari, p. 8 n.5), is incorrect. Although Petitioner filed "plenary briefs" to accompany his Application for Certificate of Probable Cause to Appeal, Respondent appropriately limited his brief in the Supreme Court of Georgia to the issue which was then before that court, whether to issue a Certificate of Probable Cause to Appeal to permit Petitioner to appeal the denial of habeas corpus relief. Because the Supreme Court of Georgia never issued a Certificate of Probable Cause to Appeal in Petitioner's case, Respondent appropriately never filed a substantive brief on the issues which Petitioner sought to appeal in his case. (*See* App. at 67).

On February 22, 1999, the Supreme Court of Georgia denied Petitioner's Application for Certificate of Probable Cause to Appeal, and on April 9, 1999, denied Petitioner's motion for reconsideration of that denial. *Gibson*

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[10] Georgia law provides that the appeal of the denial of habeas corpus relief is a discretionary appeal, and a petitioner seeking to appeal the denial of habeas corpus relief must file with the Supreme Court of Georgia an Application for a Certificate of Probable Cause to Appeal. An appeal is allowed only if the Supreme Court of Georgia grants the Application and issues a Certificate of Probable Cause to Appeal. O.C.G.A. § 9-14-52.

v. Turpin, 270 Ga. 855, 515 S.E.2d 186 (1999) (Pet. App. at A1-A30, A71).

This case therefore reaches this Court on a petition for certiorari review of an opinion accompanying a state supreme court disposition denying discretionary review in a collateral habeas corpus proceeding.

REASONS FOR NOT GRANTING THE WRIT

I. THIS CASE DOES NOT PRESENT EITHER OF THE QUESTIONS PURPORTEDLY RESERVED BY THIS COURT IN *MURRAY V. GIARRATANO* AND *COLEMAN V. THOMPSON*.

As a straightforward factual matter, this case does not present either of the questions purportedly reserved by this Court in *Murray v. Giarratano, supra*, 492 U.S. 1, and *Coleman v. Thompson*, 501 U.S. 722 (1991).

As demonstrated by the procedural history of this case, Petitioner was not "forced" to proceed without the assistance of counsel for state collateral review, and state habeas corpus was not the first forum in which Petitioner could have presented constitutional claims. Instead, the record shows unequivocally that without State prompting and to avoid new timelines, Petitioner voluntarily filed a habeas corpus petition prepared by the Resource Center and that throughout the pendency of the state habeas corpus proceedings, Petitioner enjoyed de facto representation by Resource Center attorneys. The Resource Center's chosen strategy for Petitioner's case was simply to

postpone Petitioner's case indefinitely or, barring that, to contrive a constitutional dilemma that, as a factual matter, does not arise in Georgia.

Petitioner's case thus does not present the question left open by *Giarratano*. In that case, Justice Kennedy (who provided the fifth vote in his concurrence) pointed out that "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Giarratano*, 492 U.S. at 14-15. Justice Kennedy's observation is equally true for Georgia.

Petitioner's case is not a case where a state prisoner was *unable* to obtain counsel to represent him in postconviction proceedings. As Petitioner himself acknowledges, the unprompted filing of his habeas corpus petition, without first securing formal representation by counsel, was a maneuver designed to avoid the application of new state habeas corpus timelines to his case. The fact that Petitioner voluntarily filed his habeas corpus petition under these circumstances belies Petitioner's repeated claim to this Court that Petitioner was "forced" to proceed without counsel in state post-conviction. This fact alone removes Petitioner's case from the circumstances reserved by Justice Kennedy in *Giarratano*.

Moreover, Petitioner in reality enjoyed representation by counsel. It is apparent even from the Resource Center's court filings that their "amicus" status was nothing more than a ruse to hide the fact that the Resource Center was functioning as counsel for Petitioner. For example, although nominally "amicus curiae" motions, the

Resource Center's early motions denominate Petitioner himself as the movant. These motions read, "Comes now EXZAVIOUS LEE GIBSON, by and through undersigned *amicus curiae* counsel. . . . " (R. 10, 13). This mode of pleading was only discontinued following Respondent's suggestion that the Court interpret such action by the Resource Center as a formal entry of appearance on Petitioner's behalf. (R. 11).

As an examination of the procedural history of this case makes clear, Petitioner was not denied meaningful access to the courts under this Court's decisions in *Bounds* and *Giarratano*. Instead, even without a formal entry of appearance by the Resource Center attorneys, Petitioner received the assistance of counsel, thus satisfying "meaningful access."

As Justice Kennedy observed in his concurring opinion in *Giarratano*: "The requirements of meaningful access may be satisfied in various ways, [and] [t]he intricacies and range of options are of sufficient complexity that state legislatures and prison administrators must be given 'wide discretion' to select appropriate solutions." *Giarratano*, 492 U.S. at 14 (quoting *Bounds*, 430 U.S. at 833). In Georgia, the General Assembly has chosen to appropriate $500,000.00 annually[11] to the Resource Center to assist volunteer counsel in the representation of indigent capital state habeas corpus petitioners and to

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[11] The Resource Center was appropriated $300,000.00 annually at the time of Petitioner's voluntary filing of his habeas corpus petition in December 1995. *See* n. 5, *supra*.

directly represent those petitioners.[12] It is clear from an examination of the procedural history of this case that the Resource Center assisted in Petitioner's state habeas corpus litigation. Petitioner and the Resource Center simply chose to concentrate that assistance on efforts to postpone Petitioner's case instead of on the advancement of the substantive claims in the habeas corpus petition.

Therefore, it is clear that the circumstances of Petitioner's case do not present the question reserved by this Court in *Giarratano*, but in fact mirror the circumstances approved by Justice Kennedy in his concurring opinion in that case.

Nor does this case present the issue purportedly reserved by this Court in *Coleman*. In *Coleman*, the Court declined to address whether there is a constitutional right to counsel in post-conviction where "state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. However, the Court in *Coleman* noted its previous holdings in *Ross v. Moffitt*, 417 U.S. 600, 616 (1974), and *Pennsylvania v. Finley, supra*, 481 U.S. at 556, that the Constitution does not require States to provide counsel "in state discretionary appeals where defendants already had one appeal as of right" or "in state collateral proceedings after exhaustion of direct appellate review." *Coleman*, 501 U.S. at 756.

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[12] In addition to the Resource Center, Georgia maintains a system of institutional lawyers similar to the system in place in Virginia at the time of this Court's decision in *Giarratano*, who contract with Georgia's prisons to provide legal assistance and representation to inmates and who were available to assist or represent Petitioner in his habeas corpus litigation.

The Court continued: "These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel to appeal a state collateral determination of his claim of trial error." *Id.* at 756-757.

This reasoning applies with equal force in Petitioner's case to dictate the answer set forth by the Supreme Court of Georgia in *Gibson v. Turpin*. In Georgia, collateral review is not the first place a capital litigant can present a claim of ineffective assistance of trial counsel. Rather, Georgia law permits the early litigation of an ineffective assistance of trial counsel claim, and any necessary evidentiary development of that claim can occur at the motion for new trial stage of a defendant's direct review proceedings,[13] when Georgia requires that the State provide defendants with counsel. *See, e.g., Williams*

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[13] *See, e.g., Davis v. State*, 263 Ga. 5, 426 S.E.2d 844 (1993) (new attorney appointed to review record for effectiveness of trial counsel and raise any ineffective assistance of trial counsel issues on motion for new trial while trial attorneys continued to represent death row defendant on all other issues at motion for new trial and direct appeal); *Kennebrew v. State*, 267 Ga. 400, 480 S.E.2d 1 (1996) (defendant entitled to new counsel upon request following trial to advance claim of ineffective assistance of trial counsel); *Glover, supra*, 465 S.E.2d at 661, n.6 (encouraging early litigation of ineffective assistance of trial counsel claims); *Williams v. Head*, Case No. 97-8983, slip op. at 4 (11th Cir. Aug. 26, 1999) ("Georgia capital defendant has right to effective assistance of counsel in a [motion for] new trial proceeding, which is where ineffective assistance claims are decided under Georgia's Unified Appeal Procedure") (citing *Williams v. Turpin, supra*, 87 F.3d at 1209-1210).

v. Turpin, 87 F.3d 1204, 1209-1210 (11th Cir. 1996). Therefore, in Georgia, collateral review will never be the first time that a capital litigant could have presented a claim of ineffective assistance of trial counsel.[14] Where a capital litigant in Georgia remains with trial counsel for his motion for new trial and direct appeal proceedings – so that his claim of ineffective assistance of trial counsel is not raised during his direct review proceedings when he remains constitutionally entitled to representation by counsel – the postponement of that claim from direct review to collateral review should not alter the analysis of this Court so as to entitle that litigant to counsel as a constitutional matter. This was not the question left open by *Coleman*.

Because this case is factually and legally distinct from the questions purportedly reserved by this Court in *Giarratano* and *Coleman*, this Court should resist Petitioner's enticement to grant certiorari.

II. THERE IS NO DIVISION AMONG THE COURTS WARRANTING SUPREME COURT INTERVENTION.

Contrary to Petitioner's representations, state and federal courts which have considered the issue are generally in accord that a post-conviction petitioner does not possess a constitutional entitlement to counsel in state

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[14] A claim of jury misconduct or knowing use of perjured testimony can likewise be litigated at the motion for new trial, and a claim of failure to produce exculpatory evidence can be presented on direct appeal if a sealed copy of the prosecutor's file is made a part of the record for direct review.

collateral review proceedings. Further, as confirmed by an examination of the Mississippi Supreme Court's opinion in *Jackson v. Mississippi*, 732 So.2d 187 (Miss. 1999), that court's holding is based on circumstances unique to the nature of death penalty litigation in Mississippi,[15] and the opinion of the Supreme Court of Georgia denying Petitioner's Application for Certificate of Probable Cause to Appeal in *Gibson v. Turpin* does not conflict with the narrow holding of the Mississippi Supreme Court.

The opinion of the Supreme Court of Georgia in *Gibson v. Turpin*, accompanying the denial of discretionary review from the habeas corpus court, is in accord with the holdings of every federal circuit court and with every state court which has examined the issue whether there is a constitutional right to representation by counsel in state collateral review proceedings, save the Supreme Court of Mississippi. This singularity of results refutes Petitioner's claim that the courts generally are unclear on this issue and need the intervention of this Court.

As the Supreme Court of Georgia noted in its opinion in *Gibson v. Turpin*, 513 S.E.2d at 191 (Pet. App. at A9), every federal court of appeals which has examined the issue has rejected the argument that there is a constitutional right to counsel in state post-conviction, even where state post-conviction may be the first available forum for litigation of a claim of ineffective assistance of counsel. *See Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997); *Parkhurst v. Shillinger*, 128 F.3d 1366 (10th Cir.

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[15] Moreover, the Mississippi court's declaration of a constitutional right to counsel may not have been founded upon the federal constitution.

1997); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996); *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir. 1996); *Nolan v. Armontrout*, 973 F.2d 615 (8th Cir. 1992).

Among the states, Mississippi is alone in proclaiming the existence of a constitutional right to counsel in capital post-conviction proceedings. Every other state which has examined the issue has rejected the argument that there is a constitutional right to counsel in capital state post-conviction proceedings. *See, e.g., State v. Mata*, 916 P.2d 1035 (Ariz. 1996); *Fretwell v. State*, 718 S.W.2d 109 (Ark. 1986); *In re Clark*, 855 P.2d 729 (Cal. 1993); *State ex rel. Butterworth v. Kenny*, 714 So.2d 404 (Fla. 1998); *People v. Owens*, 564 N.E.2d 1184 (Ill. 1990); *Harper v. Commonwealth*, 978 S.W.2d 311 (Ky. 1998); *State v. Hunter*, 840 S.W.2d 850 (Missouri 1992); *Gollehon v. District Court of the Third Judicial District*, 897 P.2d 1058 (Mont. 1995); *State v. Victor*, 494 N.W.2d 565 (Neb. 1993); *McKague v. Warden*, 912 P.2d 255 (Nev. 1996); *State v. Scudder*, 1998 Ohio App. LEXIS 5642 (Ohio App. 1998), *discretionary review denied*, 85 Ohio St.3d 1456 (1999); *Braun v. State*, 937 P.2d 505 (Okla. Crim. App. 1997); *Commonwealth v. Peterkin*, 649 A.2d 121 (Penn. 1994); *House v. State*, 911 S.W.2d 705 (Tenn. 1995); *Ex parte Davis*, 947 S.W.2d 216 (Tex. 1996); *In re Gentry*, 972 P.2d 1250 (Wash. 1999).

It is not clear from the *Jackson* opinion whether the constitutional right to counsel found in that case is based upon the federal constitution. The majority in *Jackson* begins its discussion of the state appeal process by noting that a conviction and sentence of death is subject to automatic review in Mississippi and that "[t]he Constitution of Mississippi requires the appointment of counsel pursuant to that automatic review." *Jackson*, 732 So.2d at

189. The concurrence in *Jackson*, which would find a right to counsel for Mississippi capital post-conviction litigants based in state statute, opines that "[t]he majority errs by stating, without authority, that [a right to counsel in post-conviction relief proceedings] is found in the Mississippi Constitution of 1890." *Id.* at 192 (Mills, J. specially concurring).

If, as the concurring opinion in *Jackson* suggests, the Supreme Court of Mississippi did not base the right to counsel announced in *Jackson* upon the federal constitution, the opinion in *Jackson* is not even arguably inconsistent with the opinion of the Supreme Court of Georgia in *Gibson v. Turpin*, and the sole purported conflict does not exist.

Even if the Mississippi high court based its right to counsel for that state's capital post-conviction litigants upon the federal constitution, its opinion in *Jackson* does not conflict with *Gibson v. Turpin* as the holding in *Jackson* rests on the unique circumstances of death penalty litigation in Mississippi, circumstances not present in Georgia's capital litigation system. As the Mississippi high court explicitly stated, its bases for finding a right to counsel were the finality of the death penalty itself and *"the nature of death penalty litigation in the courts of this state."* *Id.* at 188 (emphasis added).

In examining the nature of death penalty litigation in the courts of Mississippi, the *Jackson* court found that state post-conviction proceedings in Mississippi "have become a part of the death penalty appeal process at the state level." *Id.* at 191. In Georgia, by contrast, habeas corpus remains "a collateral attack that is separate and

distinct from direct review . . . . It is not an extension of direct appeal." *Gibson v. Turpin*, 513 S.E.2d at 188. (Pet. App. at A4).

The nature of death penalty litigation in Mississippi is also distinct from the nature of death penalty litigation in Georgia because state post-conviction is the first place a Mississippi capital litigant can engage in evidentiary development of a claim of ineffective assistance of trial counsel. In Mississippi, "[c]ertain issues *must* often be deferred until the post-conviction stage, such as the claim of ineffective assistance of counsel." *Jackson*, 732 So.2d at 190 (emphasis added). As the Supreme Court of Mississippi outlined in *Read v. State*, 430 So.2d 832, 841-842 (Miss. 1983), while a claim of ineffective assistance of counsel may be asserted by new counsel on direct appeal in Mississippi, the appellate court will only reach the merits of such a claim on direct appeal if ineffectiveness is affirmatively shown from the record of the trial proceedings or if the parties stipulate that the record is adequate and the appellate court "determines that findings of fact by a trial judge able to consider the demeanor of witnesses, etc., are not needed." *Id.* at 841.

> In all other cases, however, inasmuch as the ineffective assistance of counsel issue substantially raises issues of fact, an evidentiary hearing will be necessary. There is no point in holding such a hearing, however, and going to all of that time, trouble, expense and agony, if the case is going to be reversed and remanded on other grounds. Where that occurs, any ineffectiveness of counsel will likely be mooted. Only in those cases where the Court cannot decide the ineffective assistance of counsel issue

> on the record presented on direct appeal and in those cases where the judgment of conviction is otherwise affirmed will it be necessary actually to hold evidentiary hearings.

Id. at 842 (footnote omitted). *See also Colenburg v. State*, 735 So.2d 1099 (Miss. App. 1999) (to be "susceptible to review by an appellate court requires that the issue of a trial counsel's effectiveness, or lack thereof, be discernable from the four corners of the trial record").

Thus, inherent in "the nature of death penalty litigation in the courts of [Mississippi]" is that a capital litigant in Mississippi can only engage in evidentiary development of a claim of ineffective assistance of trial counsel in collateral post-conviction proceedings.

By contrast, a capital litigant in Georgia is not required to wait until post-conviction review to engage in evidentiary development of a claim of ineffective assistance of trial counsel. Instead, Georgia law not only permits, but encourages, the early litigation of an ineffective assistance of trial counsel claim, and any necessary evidentiary development of that claim can occur at the motion for new trial stage of a defendant's direct appeal proceedings, when a capital litigant remains constitutionally entitled to representation by counsel to litigate his claim of ineffective assistance of trial counsel. *See, e.g., Davis v. State, supra*, 426 S.E.2d 844; *Kennebrew, supra*, 480 S.E.2d 1; *Glover, supra*, 465 S.E.2d 659; *Williams v. Head, supra*, Case No. 97-8983 (11th Cir. Aug. 26, 1999). *See* n. 13, *supra*. Therefore, in Georgia, collateral review continues to retain its collateral purpose. *See, e.g., Williams v. Head, supra*, Case No. 97-8983 (where capital litigant had new counsel who raised ineffective assistance of trial

counsel claim at motion for new trial, it is the evidence presented at the motion for new trial proceedings which will be dispositive of litigant's ineffective assistance of trial counsel claim).

This Court's jurisprudence has consistently recognized that while a defendant has a constitutional right to counsel to litigate his "one and only appeal" of right,[16] the right to counsel does not extend to state collateral proceedings after exhaustion of direct appellate review. It is clear from the nature of death penalty litigation in Georgia that Georgia post-conviction proceedings cannot be considered a capital litigant's "one and only appeal" of right, and that post-conviction proceedings in Georgia remain collateral. Therefore, for a system such as Georgia's, where ineffective assistance of trial counsel can be developed and litigated in a motion for new trial and where habeas corpus "is not an extension of direct appeal," the *Gibson v. Turpin* opinion appropriately recognizes the rationale of *Ross, Finley,* and *Giarratano* as controlling.

Finally, another important difference in the nature of death penalty litigation in Mississippi and the nature of death penalty litigation in Georgia is that "[i]n Mississippi, repeatedly since 1995, death row inmates have been unable to obtain counsel or requisite help from institutional lawyers." *Jackson,* 732 So.2d at 191. By contrast, in Georgia every death row habeas corpus litigant both

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[16] *Coleman, supra,* 501 U.S. at 756 (quoting *Douglas v. California,* 372 U.S. 353, 357 (1963)).

before and since Petitioner has been represented by counsel in state post-conviction proceedings.

Because the nature of death penalty litigation in Mississippi differs in critical respects from the nature of death penalty litigation in Georgia, it is clear that the Mississippi high court's opinion in *Jackson*, drawn narrowly on circumstances unique to Mississippi, does not conflict with the opinion of the Supreme Court of Georgia in *Gibson v. Turpin*.

III. THIS CASE DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR THE GRANT OF CERTIORARI.

Due to the procedural posture of this case, arriving at this Court on a petition for certiorari review of an opinion accompanying a state supreme court disposition denying discretionary review, the record below is not developed.

The only issue before the Georgia Supreme Court for determination below was whether to issue Petitioner a Certificate of Probable Cause to Appeal, thus permitting a discretionary appeal of the state habeas corpus court's order denying relief. In the absence of an order of the Georgia Supreme Court issuing a Certificate of Probable Cause to Appeal, no issues were accepted for appeal. As the state supreme court below never accepted any issues for briefing on the merits, this case does not provide the Court with the benefit of briefing below by Respondent.

Further, and of paramount significance to this Court's decision whether to exercise its certiorari jurisdiction, this case does not present the facts which Petitioner

claims exist in seeking certiorari review. Namely, this is *not* a case where a death row inmate was unable to obtain representation or assistance from counsel and was forced to "fend for himself" in collateral review proceedings which were his only opportunity to present crucial constitutional claims.

Moreover, because the true issue before the habeas corpus court was never that representation or assistance was unavailable to Petitioner but rather whether the habeas corpus court was to be required to abdicate control over the progress of a habeas corpus case pending before it,[17] the record in the habeas corpus court below was never developed with the types of information and statistics which would be necessary if a court were to examine the question whether a capital post-conviction petitioner has a constitutional entitlement to counsel.

Finally, Respondent notes that if this Court declines to exercise its certiorari jurisdiction at this time, the lower federal courts will have an opportunity to examine the state post-conviction proceedings and grant an evidentiary hearing to Petitioner on his claims in federal court if the federal courts determine that an evidentiary hearing is warranted.

For all of these reasons, this is not an appropriate case for the grant of certiorari.

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[17] *See* Respondent's response opposing a grant of discretionary review. (App. at 67, 89).

CONCLUSION

For all the above and foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

THURBERT E. BAKER
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PAIGE REESE WHITAKER
Assistant Attorney General
(*Counsel of Record*)

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IN THE SUPERIOR COURT OF BUTTS
STATE OF GEORGIA

EXZAVIOUS GIBSON ,
Petitioner,

EF 261140 ,
Inmate Number

vs

ALBERT G. THOMAS ,
Warden,
Georgia Diagnostic and
Classification Center ,
Name of Institution
Respondent.

Civil Action No. 95-V-648

Habeas Corpus

(Filed Dec. 20, 1995)

APPLICATION FOR WRIT OF HABEAS CORPUS

**** PART I ****

1. Name and county of court which entered the judgment of conviction under attack Superior Court of Dogde [sic] County

2. Date of conviction June 14, 1990

3. Length of sentence(s) Death, Life (armed robbery)

4. Name of offense(s) (all counts) Murder, Armed Robbery

5. What was your plea? (Check one)

   (a) Guilty ( )
   (b) Guilty but mentally ill ( )
   (c) Nolo contendere ( )
   (d) Not guilty (x)

If you entered a guilty plea to one count or indictment, and a not guilty or nolo contendere plea to another count or indictment, give details:

_____

_____

_____

6. Kind of trial: (Check one)

   (a) Jury (x)
   (b) Judge only ( )

7. Did you testify at the trial: Yes (x) No ( )

8. Did you appeal from the conviction: Yes (x) No ( )

9. If you did appeal, answer the following:

   (a) Name of appellate court to which you appealed Supreme Court of Georgia
   (b) Result of appeal Conviction and Sentence Affirmed
   (c) Date of result June 10, 1991

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this conviction in any state or federal court: Yes (x) No ( )

11. If your answer to 10 was "yes", give the following information: (If more than three petitions, please use separate sheet of paper and use the same format to list these petitions.)

    (a) (1) Name of court and case number U.S. Supreme Court
        (2) Nature of proceeding Petition for Writ of Certiorari
        (3) All grounds raised (attach extra sheet if necessary) See Attached

(4) Did you receive an evidentiary hearing on your application or motion?
Yes ( ) No (x)
(5) Name of Judge _____
(6) Result Certiorari Denied
(7) Date of result February 24, 1992

(b) As to any second petition, application or motion give the same information:

(1) Name of court and case number n/a
(2) Nature of proceeding _____

(3) All grounds raised _____

(4) Did you receive an evidentiary hearing on your application or motion?
Yes ( ) No ( )
(5) Name of Judge _____
(6) Result _____
(7) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court and case number n/a
(2) Nature of proceeding _____

(3) All grounds raised _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Name of Judge _____

(6) Result _____

(7) Date of result _____

(d) Did you appeal to the Georgia Supreme Court or the Georgia Court of Appeals from the result taken on any petition, application or motion listed above:

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did not appeal from the denial of relief on any petition, application or motion, explain briefly why you did not:

_____

_____

_____

(f) If you appealed to the highest state court having jurisdiction, did you file a petition for certiorari in the United States Supreme Court to review the denial of your petition by the Georgia Supreme Court or the the [sic] Georgia Court of Appeals? Yes ( ) No ( )

**** PART II ****

State concisely every ground on which you now claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may

attach pages stating additioinal [sic] grounds and facts supporting same.

1

Ground one: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

2

Ground two: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

3

Ground three: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

4

Ground four: See Attached

Supporting FACTS (tell your story briefly without citing cases or law):

**** PART III ****

If any of the grounds listed in PART II were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

**** PART IV ****

1. Do you have any petition or appeal now pending in any court, either state or federal, as to the conviction under attack?
   Yes ( ) No (x)

2. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing W. Dennis Mullis, 202 Cherry Street, Cochran, GA 31014

(b) At arraignment and plea W. Dennis Mullis

(c) At trial W. Dennis Mullis

(d) At sentencing W. Dennis Mullis

(e) On appeal W. Dennis Mullis

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding _____

3. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes (x) No ( )

Do you have any future sentence to serve after you complete the sentence imposed by the conviction under attack? Yes ( ) No (x)

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment wich [sic] imposed the sentence to be served in the future: Yes (x) No ( )

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Pro Se _____ ____
_____ Date
_____
Signature and Address of
Petitioner's Attorney (if any attorney)

I declare (or certify, verify, or state) under penalty of prejury [sic] that the foregoing is true and correct. Executed on Dec. 15, 1995
Date

/s/ E.L. Gibson
Signature of Petitioner

Please note that under O.C.G.A. §9-14-45 service of a petition of habeas corpus shall be made upon the person having custody of the petitioner. If you are being detained under the custody of the Department of Offender Rehabilitation, an additional copy of the petition must be served on the Attorney General. If you are being detained under the custody of some authority other than the Department of Offender Rehabilitation, an additional copy of the petition must be served upon the district attorney of the county in which the petition is filed. Service upon the Attorney General or the district attorney may be had by mailing a copy of the petition and a proper certificate of service.

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON, Petitioner, v. ALBERT G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	HABEAS CORPUS No. 95-V-648 (Filed Dec. 20, 1995)

PETITION FOR WRIT OF HABEAS CORPUS

EXZAVIOUS LEE GIBSON, pro se, petitions this Court for a Writ of Habeas Corpus, pursuant to O.C.G.A. §§ 9-14-41 *et seq.* Mr. Gibson is an indigent person currently under sentence of death. Respondent is the Warden of the Georgia Diagnostic and Classification Center in Jackson, Georgia. The allegations of this petition are set forth as follows:

I. INTRODUCTION

This Petition was prepared by personnel at the Georgia Appellate Practice and Educational Resource Center, Inc. ("Resource Center"). The Resource Center was established as a result of the combined efforts of the State Bar of Georgia, the Attorney General of Georgia, and the state and federal bench, to help ensure that all death-sentenced

Georgia inmates are adequately represented in their post-conviction appeals. There is no state mechanism for providing counsel to death-sentenced inmates in post-conviction proceedings. The Resource Center, funded by the Judicial Counsel of Georgia, aids attorneys who volunteer to represent capital inmates *pro bono*, by assisting in investigating their cases, identifying issues, researching petitions and briefs, and preparing for hearings.

Petitioner is under sentence of death in the State of Georgia. One of the functions of the Resource Center is to find volunteer, *pro bono* counsel for death-sentenced inmates in Georgia. That process is a time-consuming one, inasmuch as capital post-conviction cases are difficult to investigate and research, under the best of circumstances. Frequently such cases involve voluminous records, and require the expenditure of large sums of money in order to assure proper representation. *See, Atlanta Journal Constitution*, December 12, 1993, "Death row cases hold appeal for too few lawyers." Petitioner's case is such a case.

The Resource Center has been unable to locate volunteer counsel for Petitioner, despite good faith efforts to do so. This state of affairs is neither surprising nor unusual, and is not the fault of Petitioner.[1] Having not found

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[1] Due to difficulties encountered in recent efforts to recruit counsel for death sentenced habeas petitioners, the Resource Center has enlisted the assistance of the Georgia Supreme Court in its search (*see* Appendix A, letters to Chief Justice Benham and Justice Fletcher). The Court has notified the Center that it will take up the matter of the recruitment of volunteer counsel in January (*see* Appendix B, letter to Stephen Kinnard).

counsel for Petitioner, the Resource Center prepared the instant pleading. The Petition raises issues which require an evidentiary hearing for proper resolution. For example, Petitioner has alleged ineffective assistance of counsel, and has alleged that the state failed to reveal material exculpatory evidence at trial and sentencing. These and other issues require evidentiary development.

Through this Petition, Mr. Gibson has presented issues routinely litigated in state habeas proceedings. However, until he receives the assistance of competent counsel, independent from his trial and appellate counsel, he is unable effectively to investigate and research his case in a manner reasonably likely to reveal all potential constitutional error existent in his conviction and sentencing. Petitioner is entitled to the assistance of such counsel.[2]

However, the Resource Center's ability to provide assistance in Mr. Gibson's case is subject to funding and staffing limitations. Historically, the Resource Center has assumed a critical role in the post-conviction representation of virtually every death-sentenced inmate in Georgia. But recent developments have ripped out the

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[2] "It is imperative that the courts have before them counsel who are competent in capital cases. . . . We do think it's essential that competent counsel be obtained in capital cases and it's very difficult to obtain them. . . . The records are huge, the expenditure of time is great. The lawyers who take these cases are burned out after taking just one whether they win or lose it. This is a very, very difficult area." *House Appropriations Subcomm.*, 104th Congress, 1st Sess. (March 8, 1995), testimony of Justice Anthony Kennedy, U.S. Supreme Court).

underpinnings of this system, forcing Mr. Gibson to proceed without the assistance of counsel.

On September 30, 1995, the Resource Center lost all federal grant funding. Since its inception, the Georgia Resource Center has relied upon the federal government for the bulk of its operating budget – seventy (70) percent of its funding. Due to this loss of federal funding, the Resource Center was forced to lay off six attorneys, three investigators and one administrative assistant. The present staff consists of two attorneys, one investigator and one administrative assistant.

The Resource Center is currently assisting in the maximum number of cases it can, given staffing and resources. Consequently, the Resource Center's ability to assist Mr. Gibson is, at least at this time, limited to the search for volunteer counsel to represent Mr. Gibson in these proceedings.

By virtue of this petition, Mr. Gibson notifies this Court that he is actively seeking counsel to represent him in these habeas proceedings. Mr. Gibson urges the Court to allow him time to procure qualified counsel. The assistance of qualified counsel in a death penalty habeas proceeding is necessary to insure that Mr. Gibson receives a full and fair hearing, and to insure that justice is done. The United States Supreme Court has recently recognized that death sentenced federal habeas petitioner's have a "mandatory right to qualified legal and related services [i]n any [federal] post conviction proceeding." *McFarland v. Scott*, 114 S.Ct. 2568, 2571 (1994). The Court premised its decision upon the finding that the complex nature of

capital litigation and the seriousness of the penalty necessitate "quality legal representation." *Id.* at 2572. This is as true in state court as it is in federal court. Capital post-conviction litigation is a highly specialized and difficult field of practice. Without the assistance of an attorney, Mr. Gibson may inadvertently omit available constitutional claims, resulting in a procedurally [sic] bar for federal court. To deny Mr. Gibson an opportunity to procure the services of counsel in these critical state court proceedings would deprive him of a full, fair and reliable forum for the litigation of his claims of state and federal constitutional error.

II. HISTORY OF PRIOR PROCEEDINGS

Mr. Gibson was convicted of malice murder and armed robbery in the Superior Court of Dodge County, Georgia, in 1990. He was sentenced to death for the murder conviction and life imprisonment for the armed robbery.

A motion for new trial was denied and Mr. Gibson's convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal. *Gibson v. State,* 404 S.E. 2d 781 (Ga. 1991). A petition for writ of certiorari filed with the United States Supreme Court was denied on February 24, 1992.

III. CLAIMS FOR RELIEF

Each claim for relief raised below is predicated on Article I, § 1, ¶¶ 1, 2, 3, 4, 5, 9, 14, 15, 16, 17, 18 of the Constitution of the State of Georgia, and the Fourth, Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and on other law set forth in the Petition.

CLAIM I

PETITIONER WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF ART. I, § 1, ¶¶ 1, 2, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA, THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND *STRICKLAND v. WASHINGTON*, 466 U.S. 688 (1984).

This claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this Claim by specific reference.

2. Petitioner was denied his right to the effective assistance of counsel at his capital trial in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 1, ¶¶ 1 & 14 of the Constitution of the State of Georgia. Trial counsel's ineffectiveness includes, but is not limited to the following:

(a) Counsel failed to conduct an adequate pretrial investigation into the State's case and defenses available to Petitioner.

(b) Counsel failed to file several motions pretrial to protect Petitioner's right to a fair trial.

(c) Counsel failed to conduct an adequate examination of potential jurors to ensure that Petitioner received a fair and impartial jury. Counsel also failed to

object to the sitting of several venirepersons who could not impartially determine Petitioner's guilt or the appropriate punishment in this case.

(d) Counsel failed to confront adequately the State's case during the guilt phase of trial.

(e) Counsel failed to object to the admission of several items of evidence offered by the State during the guilt phase of trial. Timely objections would have insured that certain improper evidence was not received and considered by the jury.

(f) Counsel failed to appropriately object to the improper closing argument of the prosecution at the conclusion of the guilt phase of trial.

(g) Counsel failed to give closing argument at the conclusion of the guilt phase which adequately exposed the shortcomings of the State's case against Petitioner.

(h) Counsel failed to raise the proper objections to improper charges given by the trial court to the jury at the conclusion of the guilt phase of trial.

(i) Counsel failed to object properly to items of improper evidence offered by the State in aggravation at the penalty phase of trial.

(j) Counsel failed to conduct an adequate pretrial investigation into Petitioner's life and background to uncover and present to the jury evidence in mitigation. As a result, the jury failed to hear compelling evidence in mitigation of sentence.

(k) Counsel failed to object properly to misleading and improper arguments made by the prosecution during its penalty phase summation to the jury.

(l) Counsel failed to object to those portions of the trial court's charge which failed to adequately define mitigating circumstances and misled the jury in other ways.

3. But for counsel's ineffective representation, there is a reasonable probability that the result of each phase of trial, and the appeal, would have been different.

CLAIM II

MISCONDUCT BY THE PROSECUTION TEAM DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL, IN VIOLATION OF ART. I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this Claim by specific reference.

2. Petitioner's rights to due process and a fair trial were violated by prejudicial remarks by the prosecution in its opening statement to the jury, in contravention of Art. I, § 1, ¶¶ 1, 11, & 17 of the Constitution of the State of Georgia, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

3. Petitioner's rights to a fair trial and to due process were violated when the state's improper and highly prejudicial argument at the close of the guilt/innocence phase.

4. Petitioner's rights under Art. I, § 1, ¶¶ 1, 11, & 17 of the Constitution of the State of Georgia and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated by the prosecutor's prejudicial and improper closing argument at the sentencing phase of the trial.

5. The prosecution team failed to disclose to Petitioner evidence in its possession which was material, and exculpatory or favorable to Petitioner on issues of guilt and/or punishment, in violation of his rights under Art. I, § 1, ¶¶ 1, 2, 11, 14 & 17 of the Constitution of the State of Georgia, and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Brady v. Maryland*, 373 U.S. 83 (1963).

CLAIM III

PETITIONER WAS TRIED UNDER GEORGIA'S UNIFIED APPEAL PROCEDURE, WHICH IS UNCONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED IN PETITIONER'S CASE, IN VIOLATION OF PETITIONER'S RIGHTS UNDER ART. I, § 1, ¶¶ 1, 2, 11, 12, 14 & 17 OF THE CONSTITUTION OF THE STATE OF GEORGIA, AND THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This claim is evidenced by the following facts:

1. All other allegations in this Petition are incorporated into this claim by specific reference.

2. On its face and as applied to Petitioner's case, O.C.G.A. § 17-10-36 (Unified Appeal Procedure) denied Petitioner his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the analogous provisions of the Georgia Constitution.

3. The Unified Appeal Procedure (hereinafter "UAP") requires that the trial court hold "conferences" with the defendant, defense counsel, and the prosecutor at various stages throughout the course of a capital case. At each conference, the court inquires of defense counsel whether he or she will raise various issues at that particular stage of the proceeding, and further inquires of the defendant whether he or she waives issues which have been discussed and not raised. The prosecutor is present at each conference. For the reasons set forth below, this procedure violates the constitutional rights of criminal defendants, and did so in Petitioner's case.

4. The UAP violates important due process considerations in the following respects. First, it upsets the balance of power between the State and the accused in the adversarial system by forcing the defense, throughout the proceedings, to disclose strategy and tactics. This allows the State to learn at various junctures in the case the intentions of the defense, without itself having to disclose any information. In Petitioner's trial, counsel and Petitioner proceeded under this novel system, and regularly disclosed to the court, in the presence of the State, defense plans and issues the defense would or would not be raising.

5. The UAP also violates a defendant's right to silence. When represented by counsel, a criminal defendant enjoys the right to be heard through counsel. Under the UAP, this right is not honored, as repeated inquiries are made of the defendant about strategy and satisfaction with counsel. At Petitioner's trial, the court repeatedly inquired of him regarding whether he was satisfied with his attorney and his acquiescence to counsel's failure to raise various issues in the case.

6. The UAP violates the right to counsel in at least three respects. By requiring the trial court to regularly ask defense counsel which issues he will or will not be raising, it necessarily results in a disclosure of counsel's strategy in violation of the work product privilege. This occurred several times during Petitioner's trial. Second, the procedure calls upon the defendant at each conference to inform the court whether he is satisfied with the performance of defense counsel. Assessment of counsel's performance during trial is an impossible task for a lay person, especially one is also under the strain of trial as the defendant. Furthermore, the UAP does not provide the defendant with independent counsel to assist him in making this important judgment. Third, the UAP thrusts the court directly into the attorney-client relationship and requires counsel to advise the defendant of issues which have little, if any, relevance to the case. This takes away from time better spent by the defendant and defense counsel pursuing relevant issues.

7. The UAP also denies a capital defendant his right to equal protection under the laws. For no rational reason, the UAP imposes the numerous above-cited costs only on capital defendants.

8. Because the UAP violates a capital defendant's rights in so many ways, the reliability of a trial and sentencing hearing held pursuant to the UAP is diminished. The capital defendant is no longer afforded the basic right to be tried in a fundamentally fair proceeding. Because Petitioner was tried and convicted pursuant to this procedure, he was denied minimal fairness and the reliability essential in capital cases.

IV. PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully prays that this Court:

1. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he may be discharged from his unconstitutional confinement and restraint, and/or be relieved of his unconstitutional sentence of death;

2. Conduct a hearing at which proof may be offered concerning the allegations of this petition;

3. Permit Petitioner, who is indigent, to proceed *in forma pauperis*, and grant Petitioner sufficient funds to secure the expert testimony necessary to prove the facts as alleged in this petition;

4. Grant Petitioner the authority to obtain subpoenas *in forma pauperis* for witnesses and documents necessary to prove the facts as alleged in this petition;

5. Allow Petitioner a period of sixty (60) days, which period shall commence after the completion of any hearing this Court shall determine to conduct, in which to brief the issues of law raised by this petition;

6. Stay Petitioner's execution pending final disposition of this petition;

7. Grant such other relief as may be appropriate.

Respectfully submitted,

/s/ EL GIBSON
EXZAVIOUS LEE GIBSON
Petitioner

Appendix A

GEORGIA RESOURCE CENTER

1375 Peachtree Street, N.E., Suite 276
Atlanta, Georgia 30309

FAX: (404) 898-2074 *(404) 898-2060*

December 12, 1995 BY HAND

Justice Norman Fletcher
Supreme Court of Georgia
State Judicial Building
Room 527
Atlanta, Georgia 30334

Re: Recruitment of volunteer attorneys in capital cases.

Dear Justice Fletcher:

On November 30, 1995, I met with you, Elizabeth Wells, Stephen Bayliss and Robert Remar to discuss the need for "volunteer" attorneys to represent capitally sentenced inmates in post-conviction proceedings. At this meeting, we discussed the increasing difficulties the Resource Center is encountering in recruiting counsel, and the role this Court has traditionally played in the recruitment of counsel in capital cases.

In the past, this Court has assisted the Resource Center in locating counsel, and has appointed Georgia law firms to represent death sentenced inmates in their post-conviction proceedings. We believe that similar assistance from this Court now will be instrumental in insuring that volunteer counsel are located.

We also discussed recent funding cuts suffered by the Resource Center which have forced the Resource Center

to lay off the majority of its staff, increasing the need for volunteer counsel. As currently funded, the Resource Center cannot handle its current caseload, much less the never ending flow of new cases in the state habeas process. With the reduced staff of two attorneys, one investigator, and one administrator, the Resource Center is no longer be [sic] able to provide direct representation to inmates seeking post-conviction relief and is unable to continue the role that it has assumed in representing Georgia's death-sentenced inmates without the assistance of volunteer counsel.

The Resource Center believes that recruitment of volunteer counsel is worth the effort, both in terms of effectiveness and efficiency. Habeas cases will not move through the process without attorneys, because death-sentenced inmates cannot reasonably be expected to investigate, prepare, and litigate their own habeas petitions. Insuring that all new inmates coming into the state habeas process are represented by competent counsel is a goal that we believe can be achieved through the combined efforts of the Resource Center, this Court and the private bar.

The Resource Center is presently seeking counsel for twenty inmates in state court. These men, all under sentence of death, are in immediate need of legal representation.

The Resource Center proposes that this Court agree to send a letter to law firms in Georgia with twenty or more members requesting that they either assume the responsibility for a capital case in post-conviction, or in the alternative, that they agree to provide financial assistance to the Resource Center that could be used in the litigation

of a capital case in post conviction. The first alternative will allow counsel who are in a position to directly represent an inmate the opportunity to do just that. The second alternative will allow counsel who wish to assist in a capital habeas proceeding but are not presently in a position to directly represent an inmate the opportunity to insure that these inmates receive adequate resources with which to litigate their cases. This second option may be a reasonable choice for large firms who have the financial means to handle a capital habeas, but who do not feel they have the necessary expertise. These much needed resources would provide funds to allow sole practitioners or attorneys from smaller firms willing to represent death sentenced inmates to do so without adverse financial impact. These alternatives will allow members of the Georgia bar an opportunity to provide pro bono services to one of the neediest segments of the prison population, in the finest tradition of the bar.

The Resource Center can provide the Court with a list of suitable firms in Georgia, a list of inmates requiring counsel and a draft letter to be sent to the law firms if the Court so requires.

Thank you for your assistance in this important matter.

Sincerely,

/s/
Stephen Kinnard
Chair, Board of Directors
Georgia Resource Center

GEORGIA RESOURCE CENTER

1375 Peachtree Street, N.E., Suite 276
Atlanta, Georgia 30309

FAX: (404) 898-2074 *(404) 898-2060*

November 8, 1995 BY HAND

Chief Justice Robert O. Benham
Supreme Court of Georgia
State Judicial Building
Room 507
Atlanta, Georgia 30334

Re: Recruitment of volunteer attorneys in capital cases.

Dear Chief Justice Benham,

I am writing to request assistance in the recruitment of volunteer attorneys for the litigation of capital collateral cases.

Since its inception in 1988, the Georgia Appellate and Educational Resource Center (hereinafter Resource Center) has endeavored to provide representation for all inmates under sentence of death in Georgia. Through its efforts, the Resource Center has ensured efficient and expedited review and resolution of many cases.

The Resource Center has traditionally relied upon volunteer attorneys to assume some of the responsibility and expense for litigating habeas cases. Unfortunately, recent efforts to recruit volunteer attorneys has been unsuccessful, and the Resource Center is now representing the majority of its clients directly without the assistance of volunteer counsel. But due to a loss of funds and staff at the Resource Center, the need for volunteer attorneys to

represent these death-sentenced individuals has increased.

As you are aware, the Resource Center recently suffered the loss of all of its federal funds, which represented approximately 70% of its operating budget. With the loss of funds, the Resource Center was forced to lay off ten members of its fourteen member staff. The remaining two attorneys, one investigator and one administrator have inherited the entire caseload of the former office. But this greatly reduced staff at the Resource Center cannot ensure that all death sentenced inmates receive adequate representation in post-conviction, thus the need for volunteer attorneys is greater now than it has been in many years.

The Resource Center is the most effective way to meet the challenges of capital post-conviction representation and to ensure the efficient review of these cases. But with the financial limitations the Center is now operating under it cannot continue to meet these challenges without the assistance of volunteer counsel.

With this background, I am requesting an opportunity to meet with you to discuss this need for additional volunteers to represent death sentenced inmates. In the past, this Court has assisted the Resource Center in locating counsel, and has appointed Georgia law firms to represent death-sentenced inmates in their state post-conviction proceedings. I would welcome an opportunity to discuss with you the continued support of the Court in the recruitment of volunteer counsel.

Please contact me at your earliest convenience.

Sincerely,

/s/
Stephen Kinnard
Chairman of the Board of Directors

Appendix B

[Seal]

Supreme Court
State of Georgia
STATE JUDICIAL BUILDING
Atlanta 30334

[Names Omitted In Printing]

Stephen O. Kinnard
Appellate Conference Office
11th Circuit U. S. Court of Appeals
56 Forsyth Street
Atlanta, Georgia 30303

Dear Mr. Kinnard:

The Court has directed me to notify you that it has approved proposed Uniform Superior Court Rule 44, dealing with death penalty habeas corpus.

A copy of the order is attached.

The Court will take up your letter regarding the Georgia Resource Center at Administrative Banc in January.

Sincerely,

/s/ Sherie M. Welch
Sherie M. Welch, Clerk

Enclosure

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON, Petitioner, v. ALBERT G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	HABEAS CORPUS No. _____

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the foregoing pleading upon Respondent by mail, first class postage affixed, addressed as follows:

Mary Beth Westmoreland
Assistant Attorney General
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334

This 20th day of December, 1995.

/s/ EL Gibson
EXZAVIOUS LEE GIBSON

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXAVIOUS GIBSON, EF-261140 Petitioner, v. A. G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	} Civil Action No. 95-V-648 } Habeas Corpus

RESPONDENT'S MOTION FOR ENTRY OF A SCHEDULING ORDER

COMES NOW A. G. Thomas, Warden, Respondent in the above-referenced civil action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and moves this Court for the entry of scheduling order adopting the time tables and guidelines of Uniform Superior Court Rule 44. This motion is made for the reasons articulated in the accompanying brief.

Respectfully submitted,

Michael J. Bowers
Attorney General
Georgia Bar No. 071650

/s/ Susan V. Boleyn (MHH)
Susan V. Boleyn
Senior Assistant Attorney General
Georgia Bar No. 065850

/s/ Mary H. Hines
Mary H. Hines
Special Assistant Attorney General
Georgia Bar No. 356080

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

EXAVIOUS GIBSON, EF-261140 Petitioner, v. A. G. THOMAS, Warden, Georgia Diagnostic and Classification Center, Respondent.	}	Civil Action No. 95-V-648 Habeas Corpus

BRIEF IN SUPPORT OF RESPONDENT'S MOTION FOR THE ENTRY OF A SCHEDULING ORDER

Respondent submits this brief in support of his motion, asking that the Court exercise it's inherent discretion to control the orderly progress of litigation pending before it by issuing a scheduling order adopting the guidelines and time tables contained in Uniform Superior Court Rule 44. While the instant petition was filed before Rule 44 became effective, Respondent submits that implementing the Rule in the form of a scheduling order at the outset of this litigation will facilitate a fair and orderly resolution of the issues presented in this habeas corpus action.

ARGUMENT AND CITATION OF AUTHORITY

On December 20, 1995, petitioner filed what purports to be a *pro se* Petition for habeas corpus relief. Petitioner has, by virtue of his petition, raised several issues that

strongly suggest a scheduling order would be appropriate under the circumstances.

The entry of a pre-trial order will ensure the existence of a procedural framework within which fundamental threshold issues may be timely and orderly resolved. These include whether claims or issues are barred from review upon habeas corpus under the principals of res judicata and procedural default. Also, a pre-trial order will fix the time during which amendments and motions may be filed. Addressing these matters prior to an evidentiary hearing will assist the court and the parties in determining in advance the scope of the evidentiary hearing so that all may prepare appropriately.

Additionally, a scheduling order will protect the parties' interests by providing notice of the expected progression of the case. It will prevent the delay filing of lengthy amendments which prejudice the Respondent's ability to make a timely response. It has become common practice for petitioners, even those represented by counsel, to file numerous amendments to petitions, frequently on the day of hearing or shortly prior to a hearing. This practice creates a situation which necessitates a request for a continuance, which in turn wastes the time and resources of the court, the respondent, and the witnesses who have been subpoenaed from across the state.

Finally, the adoption of the proposed scheduling order will not prejudice the petitioner. As provided in Uniform Superior Court Rule 44.5, the petitioner may always, for good cause shown, request the court to modify the time periods set forth in the scheduling order.

CONCLUSION

For these reasons, respondent prays that this court issue a scheduling order adopting Uniform Superior Court Rule 44, subparts 44.1 through 44.13.

Respectfully submitted,

Michael J. Bowers
Attorney General
Georgia Bar No. 071650

/s/ Susan V. Boleyn (MHH)
Susan B. Boleyn
Senior Assistant Attorney General
Georgia Bar No. 065850

/s/ Mary H. Hines
Mary H. Hines
Special Assistant Attorney General
Georgia Bar No. 356080

Please serve:

Mary H. Hines
DREW, ECKL & FARNHAM
P.O. Box 7600
880 West Peachtree Street
Atlanta, Georgia 30357
(404) 885-6226

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Return and Answer [sic], prior to filing the same, by United States mail, properly addressed, upon:

Exavious L. Gibson
EF 261140
Georgia Diagnostic and Classification Center
P.O. Box 3877
Jackson, GA 30223

Georgia Resource Center
1375 Peachtree Street, N.E.
Suite 276
Atlanta, Georgia 30309

Honorable Timothy G. Vaughn
District Attorney
Oconee Judicial Circuit
P.O. Box 1027
Eastman, Georgia 31023-1027

Honorable J. Carlisle Overstreet
Judge Superior Court
Augusta Judicial Cuircuit [sic]
305 City-County Building
530 Greene Street
Augusta, GA 30911

This 1st day of February, 1996.

/s/ Mary H. Hines
Mary H. Hines
Special Assistant Attorney General

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

CIVIL ACTION NO. 95-V-648

EXAVIOUS GIBSON, EF-261140 vs. A. G. THOMPSON, Warden, Georgia Diagnostic and Classification Center,	)))))))	HABEAS CORPUS (Filed Feb. 12, 1996)

SCHEDULING ORDER

In order to control the orderly progress of the above styled litigation and to facilitate a fair and orderly resolution of the issues presented in this action, the Court hereby and in accordance with the guidelines set forth in Superior Court Rule 44, establishes the following specific dates.

The petitioner has until Monday, February 18, 1996 to file pretrial motions. The respondent has until Tuesday, March 19, 1996 to file any pretrial motions. Responses to motions shall be governed by Uniform Superior Court Rule 6.2. No later than Thursday, April 18, 1996, Petitioner may amend his petition.

The Court reserves the right to shorten any time period set forth above and may extend such time period for good cause.

SO ORDERED, this 8th day of February, 1996.

/s/ J. Carlisle Overstreet
J. Carlisle Overstreet
Judge, Superior Court
Augusta Judicial Circuit

CERTIFICATE OF SERVICE

I do hereby certify that on this day and prior to filing I served a copy of the within and foregoing ORDER upon the following:

Exavious L. Gibson, EF-261140
Georgia Diagnostic and Classification Center
Post Office Box 3877
Jackson, Georgia 30223

Georgia Resource Center
1375 Peachtree Street, N.E.
Suite 276
Atlanta, Georgia 30309

Timothy G. Vaughn
District Attorney
Oconee Judicial Circuit
Post Office Box 1027
Eastman, Georgia 31023-1027

Mary H. Hines
DREW, ECKL & FARNHAM
Post Office Box 7600
Atlanta, Georgia 30357

by mailing a copy thereto in a properly addressed envelope with adequate postage affixed thereon to assure delivery.

This 8th day of February, 1996.

/s/ J. Carlisle Overstreet
J. Carlisle Overtreet [sic]
Judge, Superior Court
Augusta Judicial Circuit

36073, 36074, STATE OF GEORGIA et al. v. DAVIS; and vice versa.

BOWLES, Justice.

Curfew Davis, hereinafter petitioner, is an inmate at the Georgia State Prison at Reidsville under death sentence for murder. He filed a complaint in Tattnall Superior Court seeking appointment of counsel to represent him in a habeas action and also seeking funds to hire investigators, pay expert witnesses, and pay litigation expenses. He originally named only the State of Georgia and Charles Balkcom, Warden, as defendants but later amended to include the Commissioners of both Troup[1] and Tattnall Counties as defendants. It is petitioner's contention that either the State or one of its political subdivisions is required to furnish him counsel and other financial assistance so that he can have a "meaningful opportunity to present his claims in a state habeas corpus proceeding." He alleges that the Superior Court of Butts County has held that indigent death row inmates must be provided with appointed counsel in state habeas proceedings and that equal protection requires that Tattnall County do the same. The trial court below dismissed all parties defendant from the case except the State of Georgia and Charles Balkcom, Warden. The court then appointed the Prisoner Legal Counseling Project, an organization funded by the State of Georgia, to examine petitioner's case and to represent him on habeas if it were determined that such a proceeding would be meritorious. In its order, the trial court recognized that this court has previously held that habeas corpus petitioners are not

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[1] Davis was convicted and sentenced in Troup County.

entitled to appointed counsel. It based its decision on an order entered in Butts County Superior Court requiring that counsel be appointed in death cases, finding that equal protection required the same treatment for inmates on death row in Tattnall County.

We reverse.

This court has repeatedly held that indigent habeas petitioners are not entitled to appointed counsel. *Pulliam v. Balkcom,* 245 Ga. 99 (2) (263 SE2d 123) (1980); *Harris v. Hopper,* 243 Ga. 244 (6) (253 SE2d 707) (1979); *Spencer v. Hopper,* 243 Ga. 532 (2) (255 SE2d 1) (1979); *McClure v. Hopper,* 234 Ga. 45 (6) (214 SE2d 503) (1975). Public funds are already provided for appointed counsel to represent indigent defendants at their trials and on their appeals as of right. However, we know of no statute, case, or constitutional provision which would permit a trial judge to appoint counsel to a habeas petitioner, to be paid out of state or county funds.

Petitioner contends that he is entitled to meaningful access to the courts and that, in his case, to have meaningful access, he must have appointed counsel and funds. He relies primarily on the United States Supreme Court case of Bounds v. Smith, 430 U.S. 817 (97 SC 1491, 52 LE2d 72) (1977).[2] In Bounds, the Supreme Court held, " . . . the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing

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[2] This court has already held that Bounds does not require the State to pay a petitioner's expenses in habeas corpus proceedings. See *Harris v. Hopper,* supra, at 245.

prisoners with adequate law libraries or adequate assistance from persons trained in the law." 430 U.S. at 828. The court did not hold that meaningful access required providing funds or appointing counsel to indigent habeas petitioners and we decline to extend the holding to so require.

A compelling argument can be made that we simply hold that counsel may be appointed to indigent death row habeas petitioners just because of the irrevocability of death. But if meaningful access to the courts means appointed counsel, are not *all* indigent habeas petitioners entitled to meaningful access to the courts and therefore appointed counsel? Would not equal protection require that all indigents receive appointed counsel? And when should such counsel be appointed? Taken to its logical extreme, petitioner's argument would require that counsel be assigned as soon as each inmate gets to his or her cell. Only then could we be sure that those indigents without enough intelligence to ask for an attorney were getting "meaningful access to the courts," as claimed by petitioner.

Even assuming we might hold that indigent death row habeas petitioners were entitled to appointed counsel, petitioner's argument goes further to require us to also provide funds for investigation, etc. The argument is that without funds to investigate and obtain facts to prove his case, petitioner is denied "meaningful access to the courts," as surely as if he never had an attorney. Though " . . . the cost of protecting a constitutional right cannot justify its total denial," "[t]his is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful

access." Bounds, supra, at 825. Testimony in this case shows that the Prisoner Legal Counseling Project already visits each prison every month to interview prisoners, give legal advice, and initiate court action in meritorious cases. It is neither necessary or desirable to appoint the Project to any given case and by appointing it to *all* death cases, for example, it may become hampered in dealing with meritorious cases of other kinds.

Because we today reaffirm our previous holdings that indigent habeas petitioners are not entitled to appointed counsel, petitioner's appeal from the dismissal of defendant county commissioners is moot.

Judgment in Case No. 36073 reversed. All the Justices concur, except Hill, J., who dissents. Appeal in Case No. 36074 dismissed. All the Justices concur.

ARGUED APRIL 14, 1980 – DECIDED JULY 16, 1980 – REHEARING DENIED JULY 30, 1980 IN CASE No. 36074.

Habeas corpus proceeding. Tattnall Superior Court. Before Judge Harvey.

Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, for appellants. (Case No. 36073).

Millard C. Farmer, Jr., Joseph Nursey, Andrea I. Young, for Davis.

Arthur K. Bolton, Attorney General, Harrison Kohler, Assistant Attorney General, Jerry Willis, M. Francis Stubbs, for appellee (Case No. 36074).

HILL, Justice, dissenting.

I would affirm the order of the trial court. It is true that indigent habeas corpus petitioners are not entitled to appointed counsel as a matter of right. *Pulliam v. Balkcom*, supra, 245 Ga. at 100; *Spencer v. Hopper*, supra, 243 Ga. at 537; *McClure v. Hopper*, supra, 234 Ga. at 50.

However, none of our cases hold that a habeas corpus court lacks the authority to appoint counsel for an indigent habeas petitioner in the exercise of its discretion. That is what the trial court did here. The court appointed the PLCP to examine petitioner's case and to represent him on habeas if the PLCP determined that such a proceeding would be meritorious. That is not appointment of counsel as of right; it is an exercise of discretion. There being no showing of abuse of discretion, I would affirm the trial court.

Respondent's Exhibit 1

CENTRAL STATE HOSPITAL

Milledgeville **Georgia 31062**

[LOGO] [LOGO] [LOGO]

May 10, 1990

The Honorable Phillip R. West
Judge, Superior Courts
Oconee Judicial Circuit
P.O. Box 571
Eastman, Georgia 31023

Re: Exzavious L. Gibson
Case No: 262-344
Dodge County
Binion 2 South

Dear Judge West:

Mr. Exzavious L. Gibson of your jurisdiction was admitted to the Forensic Services Division of Central State Hospital on April 18, 1990, pursuant to your order for pretrial psychiatric evaluation. Your order, which charges Mr. Gibson with armed robbery and murder, calls for our assessment of his competency for trial, criminal responsibility, and recommendations for disposition. Before beginning the evaluation process, Mr. Gibson was informed of his rights and of the possible uses of the information obtained.

Mr. Gibson is charged with the murder of an Eastman, Georgia resident on or about February 2, 1990. He is charged with stabbing the victim to death. Because of the nature of the crime, the state has decided to seek the death penalty.

Central State Hospital Police RAP Sheet indicates that Mr. Gibson has had several prior encounters with the

law. According to the sheet, he was charged with theft and assault in Maryland in 1989, it also indicates that he has been charged with a number of other crimes in Florida. Throughout his childhood and adolescent years, Mr. Gibson has been in one institution or another, seemingly for the majority of his life. It is clear to this examiner that, by history, Mr. Gibson is currently on an antisocial continuum of behavior.

Psychological testing indicates that Mr. Gibson functions within the average range of general intelligence. Psychological testing revealed possible malingering, or exaggeration of existing problems. No psychotic symptoms were noted throughout the testing and interview sessions and Mr. Gibson was in good contact with reality as he has been throughout his hospitalization.

Mr. Gibson has been cooperative throughout the evaluation process. He has not revealed any details of the incident which led to his arrest beyond statements he made to the police when he was arrested. We see no reason why he is not able to cooperate with counsel in his own defense. He understands the charges against him, he understands that he has a lawyer, Mr. Dennis Mullis, and he understands that he could be sentenced to the electric chair if convicted.

I find no evidence of a disorder of thought or mood that would impair his ability to distinguish right from wrong or legality from illegality. I find no evidence of a delusional compulsion. Beyond the fact that Mr. Gibson's upbringing, has pointed him in the direction of the development of an antisocial personality disorder, I see no particular mitigating factors in this case.

We will be returning Mr. Gibson to your jurisdiction to await disposition of his charges. I consider Mr. Gibson to be dangerous and to be a possible escape risk. Therefore, the authorities should be alert and vigilant concerning possible escape behavior.

Thank you for this opportunity to be of assistance to your court. If I can clarify any of the information in this report or be of assistance in any other way, please contact me at 912-453-4281 or write to me at the above address.

Sincerely,

/s/ Robert J. Storms, Ph.D.
Robert J. Storms, Ph.D.
Senior Psychologist
Forensic Services Division

RJS:id

cc: Mr. Tim Vaughn
Mr. Dennis Mullis

Respondent's Exhibit 2A

GEORGE T. ANDERSON, PH.D.
CLINICAL PSYCHOLOGIST
DUBLIN, GEORGIA 31040-0889

P.O. BOX 889 PHONE 272-5586

May 29, 1990

Mr. Dennis Mullis
Attorney at Law
P. O. Box 429
Cochran, Georgia 31014

Dear Mr. Mullis:

At your request I have gone to the Dodge County Jail to see your client, Exzavious Gibson. The officials there made an adequate room available to me for the evaluation and this has been carried out. The results of the evaluation are included in my enclosed report. In my opinion, the client is able to cooperate with counsel in his defense. From a psychological point of view, I find no reason why he could not stand trial. If after reading the report you have additional questions, please feel free to contact me.

I certainly appreciate the referral.

Sincerely,

/s/ George T. Anderson
George T. Anderson, Ph. D.
Clinical Psychologist

GTA:bjd
Enclosure

GEORGE T. ANDERSON, PH.D.
CLINICAL PSYCHOLOGIST
DUBLIN, GEORGIA 31040-0889

P.O. BOX 889 PHONE 272-5586

CONFIDENTIAL
PSYCHOLOGICAL EVALUATION

Name: Exzavious Gibson
Date of Evaluation: May 28, 1990
Date of Birth: March 31, 1972
Age of Evaluation: 18 years

Tests Administered:

Wechsler Adult Intelligence Scale-Revised
Wide Range Achievement Test-Revised
Bender-Gestalt
Projective Drawings
Rorschach
Mini Mult

BACKGROUND INFORMATION:

This 18 year old, black, single male was seen on referral from his attorney, Mr. Dennis Mullis. The client was seen in the Dodge County Jail.

Background information provided to me indicates that the client has been indicted for murder and is soon to go on trial. He has been evaluated by the Forensic Team at the Binion Building at Central State Hospital and a second opinion was requested.

CURRENT HISTORY:

The client was seen in the jail at Dodge County where an adequate examining office was made available. He was wearing leg chains but no handcuffs. Therefore, he was free to manipulate the test materials properly. The client

did not make good rapport with this examiner, did not make eye contact, did not seem at all interested in the test procedures even after the importance was explained to him.

The client indicates that he as brought up in the State of Maryland by an aunt after his mother died when he was two (2) years of age. He went to Florida and lived in the Jacksonville area for several months, spent two and a half (2½) months in jail there before coming to the Eastman, Georgia area where he has been since January of 1990. He states he went to school as far as the ninth grade in regular classes, was retained in the eighth grade and quit going. He is not married, does not have children.

The client does not report any history of surgery, does report some minor head injures [sic], does not report seizures, does not report any current medications.

He has not been in the military service. He states he has done some construction work and some work in fast food restaurants. He has not worked any in the last year or so.

He was seen at Central State Hospital where he stayed about a month and this is the only time he has ever been hospitalized in any sort of psychiatric facility. Prior to being confined he did report drinking alcoholic beverages, states he drank whatever he could get. He states he has used drugs, did not remember what kind but has used especially what he called "coke and weed". When ask [sic] about his prior court appearances, the client was quite vague but states he has not been sent to prison previously. He states he has been in trouble with the law before for trespassing, disorderly conduct, breaking and entering, attempted arson and "a bunch of other stuff".

He states he was put in a juvenile home once as a juvenile, spent two and a half ($2^1/_2$) months in jail in Florida but this is the longest he has ever been locked up at any one time. He has not been sent to an adult prison. He was very reluctant to talk about this area.

The client does not report any physical health problems. He is able to take care of such self-help skills as feeding, dressing and bathing himself. He can tell time, did not know the exact day of the month although he knew the year and month. He does not have a driver's license. He does not report any difficulties with vision nor hearing. His speech is clear but he does not volunteer much information, is very quiet.

Concerning his background, he states his mother died when he was two (2) years old, he lived with an aunt in Maryland, lived with another aunt in Eastman, lived alone in Florida. He states he has never had any contact with his father and does not have brothers or sisters.

PSYCHOLOGICAL TESTS RESULTS:

On the Wechsler Adult Intelligence Scale-Revised, Exzavious Gibson attained a Verbal IQ of 78, Performance IQ of 76, resulting in a Full Scale IQ score of 76. This would place him in the Borderline Range of intelligence with the following scaled scores reported.

Verbal		Performance	
Information	4	Picture Completion	4
Digit Span	8	Picture Arrangement	7
Vocabulary	7	Block Design	7

Arithmetic	6	Object Assembly	7
Comprehension	2	Digit Symbol	7
Similarities	7		

We see clearly the most unusual feature of the test is the very low score on Comprehension. This scale measures common sense judgements and indicates that the client is quite weak in this area.

The Wide Range Achievement Test-Revised shows:

	GRADE EQUIVALENT	STANDARD SCORE	CENTILE
Reading	9E	91	27
Arithmetic	5E	68	2.0

The client seemed to just quit on the arithmetic section, likely could have done better. In general, he did not seem to put forth his best effort on the tests, did a lot of deep breathing and wanted to take a break and quit doing the tests, obviously did not want to do them. As a result it is not felt that the scores represent his best effort, he probably has a little more ability than the above reported scores state.

The figures of the Bender-Gestalt are drawn legibly, recognizably and on one page. There is no rotation, no perseveration, no distortion. He does reduce the designs in size and reduces designs 1 and 2 in number. The scoring would be in the Borderline Range. Overall the figures do not represent impairment in visual motor coordination.

Projective Drawings show a bare compliance with instructions. They suggest an individual who is angry, hostile and suspicious.

The Mini-Mult indicates that the client probably exaggerate his symptoms. The Validity Scales show show [sic] a peak on F scale which is normally seen in individuals who exaggerated their symptoms. To the degree that the evaluation on this test could be considered valid it would show scales 4, 8, and 2 elevated above the critical levels in that order followed by scales 6 and 1 that reached the critical range. Scales 3, 9, and 7 are just below the critical range. Individuals with this pattern are stated to be depressed, tense, irritable, to distrust people, to keep people at a distance and to have a good deal of hostility. It is common for juvenile delinquents to demonstrate this pattern. Individuals with this pattern are frequently found to be unpredictable and impulsive. They do not develop close relationships with people and tend to distrust others. The [sic] frequently get into trouble because of their poor judgement and demonstrate some antisocial features. Individuals with this pattern who commit crimes are frequently found to carry out crimes that are poorly planned and poorly executed.

He was able to give scorable responses to all of the Rorschach pictures. Some unusual responses are noted including some that would suggest anger, frustration, as well as some depressed mood. One quite unusual response is noted but overall the figures would not be felt to demonstrate bizarre ideation.

PSYCHOLOGICAL ASSESSMENT:

We see then an individual who scores in the Borderline Range of intelligence, who likely has more intellectual potential than this. He did not seem to be putting forth his best effort on the testing, did not seem to be well motivated despite the importance the testing was to him. He maintained a rather distance manner with this examiner, was rather glib and superficial. He barely complied with the test instructions in some instances and could not be thought of as being particularly cooperative. The only hospitalization he reports was a court ordered evaluation at Central State Hospital. He has not been treated as an outpatient for psychological problems, does give a history of some alcohol and drug abuse when he was on the streets. Looking at the Carpenter, Strauss and Bartko signs of schizophrenia, the client does not meet this criteria. He gives some vague auditory experiences which do not sound at all like true hallucinations. He does not report any delusional thinking at all. He has had some feelings of alienation most particularly since he has been arrested. He does report some restriction of affect likewise since he has been arrested. He does not report any suicidal thoughts, plans nor attempts at any point in his life.

CURRENT MENTAL STATUS:

The client is alert, a little tense, appears his stated age. His behavior seemed to be a little inappropriate and distant. He seemed to be somewhat withdrawn, preoccupied with his own thoughts, quite guarded. His

behavior in the past seems to have been more impulsive and manipulative. His speech is not spontaneous, generally is clear, coherent, reflecting something of a lower socio-cultural background. His thought processes do not indicate delusions nor hallucinations. He does report some fear of spiders but only when specifically ask [sic]. His emotional level does appear somewhat constricted, his mood somewhat depressed. He is not completely correctly oriented in time, although this likely is the function of incarceration. He does not report any difficulties with memory but certainly has a rather convenient memory. He does not show good insight into the psychological component to his problem.

In discussing with the client the upcoming trial, I talked to him about the roles of various people in the court room setting. He understands the charges against him, he understands the seriousness of the situation, he understands the roles of the Defense Attorney, District Attorney, Judge and Jury. He is felt to be capable of cooperating with counsel in his own defense.

From a psychological point of view, I find no reason why he could not be ready to stand trial. Certainly, an arrest, incarceration and trial are all upsetting and would be to any person. He may experience some emotional reaction to the whole process which would be considered a normal reaction.

DIAGNOSIS DSM III REVISED:

Axis I: Alcohol abuse in remission while confined Code 305.00

Psychoactive substance abuse NOS in remission while confined Code 305.90 (primarily cocaine and marijuana)

Adjustment disorder with depressed mood Code 309.00

Axis II: Antisocial personality disorder Code 301.70 (Major Diagnosis)

Borderline intellectual functioning V40.00

Axis III: No Diagnosis by Client History

Axis IV: Severity of psychosocial stressors Code 4 – Severe (confinement)

Axis V: Global assessment of functioning scale 50

/s/ George T. Anderson
George T. Anderson, Ph. D.
Clinical Psychologist

GTA:bjd

Respondent's Exhibit 2B

INTERVIEW WITH DR. GEORGE ANDERSON

Dr. Anderson is a clinical psychologist who examined Exzavious Lee Gibson most recently.

This interview occurred on June 2, 1990, at 10 A.M.

Q.: Phone ringing.

A.: Hello. This is Dr. Anderson. How are you?

Q.: Fine. You got a minute?

A.: I'm fixing to start with somebody but go ahead.

Q.: Well, I just want to talk to you about the results on Exzavious Gibson.

A.: Right.

Q.: Uh, There were a couple of things. You. In there you described him on a couple of occasions as borderline in intelligence. What does that signify to you?

A.: Actually, he's brighter than that, but that's how he scored. He just didn't have any motivation. He wasn't, to me, he just didn't act like he cared one way or the other.

Q.: Yea?

A.: He's, he's about a half a peg below average. He's certainly not retarded.

Q.: There is no question in your mind that he is not retarded?

A.: Right.

Q.: O.k. Well, that's what I wanted to know then. Uh, let's see. Was there anything else I wanted to ask? O.k. So, you feel like that he just did not try on the test, is that correct?

A.: Well, he put forth, you know, a little effort, but he, he didn't. In other words if he had been applying for a job, he would of worked on it a lot harder.

Q.: Yea, ~~yea~~.

A.: He, he's not retarded. He probably really is, oh, a few points, at least five or six points, higher than what he actually tested, but he tested in the borderline range which is. He's clearly not retarded.

Q.: O.k. Well, that's what I wanted to know. I certainly appreciate your help.

A.: Well, I'm not much help on that case I know.

Q.: Well, you can't change what you got to work with. Neither can I.

A.: I know.

Q.: All right. Thanks a lot. Bye.

A.: O.k.

Respondent's Exhibit 2C

TELEPHONE INTERVIEW WITH
DR. ROBERT STORMS OF

CENTRAL STATE HOSPITAL

Date: May 15, 1990
Time: Approximately 1:45 P.M.

RE: Exzavious Gibson

Q.: (Phone ringing.)

A.: Hello.

Q.: Dr. Storms?

A.: Yea.

Q.: This is Dennis Mullis in Cochran, Georgia. How are you?

A.: I'm doing fine. How are you doing?

Q.: All right. I am the attorney for Exzavious Gibson.

A.: Yea.

Q.: I believe you remember him, don't you?

A..: Yea, I sure do.

Q.: O.k. I was reading your report to Judge West and had a few questions. Have you got some time to discuss it?

A.: Certainly.

Q.: One thing that you had lifted from him apparently that I was somewhat unaware of. Uh, you indicated that he had been in one institution or another for the majority of his life.

A.: Well, that's what it sounded like. I mean he is, you know, he's a kid that's been in a lot of trouble and

has it seems like essentially raised himself. Yea, Yea. I mean I'm not sure all the exact, which institutions they were. They're probably equivalent to YDCs and stuff like that.

Q.: Yea?

A.: Uh, but, yea, I mean he has not had a particularly wonderful upbringing.

Q.: Yea? Did you elicit any history of child abuse or anything of that nature?

A.: Na, I wasn't able to get that.

Q.: O.k. What sort of testing procedure did you follow?

A.: Well, actually we, well we did a, uh, an intelligence test to find out if he was retarded or not and he's not.

Q.: Did you have an I.Q. figure?

A.: Yea, it's somewhere in the 80's. Actually I can't remember. I think we did, probably did, I think we did an MMPI which was malingered because he wasn't trying too hard on it and we also had, did a neurological evaluation over at the Neurology Department which came back totally negative, so I didn't feel like there was anything, you known, [sic] there wasn't anything, anything physical.

Q.: Yea. What about as far as the personality test?

A.: Well, like I said it was malingered so I don't think the results were particularly valid.

Q.: I see. Do they still use the PAT [handwritten "T" over "P" in original] type of thing or is that antiquated?

A.: Yea, but I don't. I don't. I'd never go into Court with a PAT [handwritten "T" over "P" in original]. Na, I

don't do that. Uh, basically, uh, I got pretty much what I needed. I wanted to make sure that he was not, he was not mentally retarded first of all, and he is well out of that range. There is no question.

Q.: Even with an I.Q. in the 80's?

A.: Na, that's still average.

Q.: Yea?

A.: You know, I mean part of the reason. He probably. He's naturally a smart guy and he's naturally extremely street smart and he, um, would probably if he'd paid more attention in the school would of probably done better on that test cause that the waves are definitely, uh, you know, well, punishes. It, it's part of a, uh, academic in nature, you know, and he probably. I can't remember, he probably scored low on the general information, finding stuff. Uh, but he is a very, he's a very street smart kid.

Q.: Yea?

A.: Nothing particularly. There's nothing retarded about him at all.

Q.: Any, uh, any doubt as far as him having realization of what he's accused of and what he's

A.: None whatsoever.

Q.: Yea?

A.: None.

Q.: O.k. Did he express any concern about his situation?

A.: Not really. You know, I mean this kid, uh, this kid really didn't express much remorse, didn't express much, you know, basically out of apathy. I mean this is a kid that's been in trouble, you know, more or less, most of his life and, uh, I don't think it means much to him. I think he functions better inside, you know, a prison situation than outside.

Q.: Yea? Uh, you indicated that you felt like he was an escape risk?

A.: Yea, I do.

Q.: Dangerous? What was the reasoning for that?

A.: Well, I think just based on his past history, and I think the fact that, you know, that this kid is really. He likes it here. He doesn't like it down there for one thing and, uh, uh, he has not been a management problem to us in any way. He has, you know, at times appeared a little bit hostile, but we're pretty, we're use to that. He is not, you know. I know that he says that he tried. I guess he was in the Eastman City Jail, is that right?

Q.: Yea.

A.: He said he tried the escape because, uh, he wanted to move out to somewhere.

Q.: Yea?

A.: Out to the county jail, but, you know, I'm never, I would just treat him consciously. I would have the authorities treat him consciously, you know.

Q.: Yeah? O.k. Well, that's basically what I had to ask.

A.: I'm sorry actually. I'm glad I'm not having to defend this.

Q.: Well, you have to call them like you see them. I understand that.

A.: Yea.

Q.: O.k. All right. I appreciate it.

A.: O.k.

Q.: Thanks a lot. Bye.

Respondent's Exhibit 3

June 11, 1990

Mr. Wash W. Larsen, Jr.
Attorney at Law
P. O. Box 2002
Dublin, Georgia 31021

RE: Eason vs. State

Dear Wash:

Thank you very much for the copy of the brief in regard to the above and the subpoena form. The brief was as cogent as anything I have ever come across. I thought the argument on page 49 answers the "indpendent test" argument beautifully. You might want to expand on that a little. What you seem to be saying is that the Court of Appeals has shifted the burden of proof to the defendant to come forward with his own independent expert.

I would prefer that my client receive a life sentence, of course, but this may very well turn out to be the test case for the federal courts. Again, thanks.

Sincerely yours,

Dennis Mullis

DM/et

Respondent's Exhibit 4

[Envelope marked "TO THE POLICE"]

[hand-drawn or hand-traced comic strips depicting Snuffy Smith saying "WELL GLORY BE!! TELL ME ALL BOUT' IT!!" and depicting Andy Capp, running into a bar, saying, "DUNNO WHY - THERE'S NEVER ENOUGH TIME TO WAIT FOR AN ANSWER"]

[Original Handwritten]

To whom it may concern:

It was a magnificent escape, if I may be so modest to say so! Here is a monition for any would be pursuit. There is a certain peril in following me! Sorry if your superior chides you, don't feel penitent ___, ___ the _____ hope it _____ up to ___! It wasn't strenuous to escape because I had an inside subsidiary. Thank Roylee for kicking the paper clip in here. Hope your not sulking?! I am unaccompanied at the moment, I'm sure you would have loved an invitation. I could have left long ago but I decided to dawdle until the time was right to bad I had to eviscerate (myself) from the crime accused. This is a tourniquet isn't it? Adios for now my friend.

almost told on myself!

Sincerely yours,
HA!Ha!Ha!

Respondent's Exhibit 5

March 27, 1990

Mr. Exzavious Lee Gibson
Inmate, Dodge Co. Jail
Eastman, Georgia 31023

RE: *State vs. Exzavious Lee Gibson*

Dear Exzavious:

As I indicated to you in court on Monday, it is extremely important that you refrain from writing anything directly concerning your case or making any drawings. I must admit that you have some talent in this area, but this is something you are going to have to avoid for awhile. As I indicated to you, law enforcement will seize these and try to use them against you in a thousand different ways. There is no sense in worsening your situation. We will need all the help we can get and there is nothing to be gained by giving the other side any ammunition. Enough said about that.

I will see you at the arraignment on Tuesday afternoon and I will be glad to answer any questions which you might have at that time.

Sincerely yours,

Dennis Mullis

DM/jm

Respondent's Exhibit 6

[Original Handwritten, Misspellings In Original]

6/1/90

Dear Mr. Mullis,

I am writing you on behalf of my case. I have a few questions. First of all when do you think my trial will start? I don't mean June 11th when they pick the jury. I mean the actuell day of my appearance for trial. Also, I heard a few guys talking about how much time people could get and I was wondering. Let's say I did not get the death penalty could the judge sentence me to a maximum time lenth like say 25 years before I get a chance for parole. Did you get the results of the test I took here at the psychaitrist you sent. I understood someone to say a woman got 20 years for cutting up her husband and freezing him, is their any truth to that statement? Would you mind telling me your expectations as to the outcome of this case. I have one more question and then I will close. Are the people hear (Police) allowed to keep me from reading the paper when their is information concerning my case (over) [Indicating Letter Is Continued On Back Of Page] in that paper? Well that is all for now; thank you very much for being my representative, I am sure you are doing you best.

Sincerly yours,
Exzavious Gibson

/s/ Exzavious Gibson

P.S. Do you think you could fine some stamps for me?

Respondent's Exhibit 7

[Original Handwritten, Misspellings In Original]

DATE

INMATE'S NAME: STATE SERIAL NUMBER:
INSTITUTION: CITY:

Dear Dennis,

I would like you to send another one of those waiver forms because I have messed up my last one along with the envelope you enclosed. Coffee! My answer is, I don't want to appear. What do you think is best? Would it make a difference if I show up? Sorry I messed up the last one I would appreciate it if you could send another along with an answer to my question. Thank You.

Sincerly yours,

Exzavious Gibson

Respondent's Exhibit 8

[Original Handwritten, Misspellings In Original]

DATE

INMATE'S NAME: STATE SERIAL NUMBER:

INSTITUTION: CITY:

Dear Mr. Mullis,

I have talked to someone who has told me it may be wise to appear at my motion for new trial. Therefore I have changed my mind and decided to appear at this phase. I am sorry if I have inconveninced you in any way. Thank you.

Sincerly yours,

Exzavious Gibson

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON, Petitioner, v. TONY G. TURPIN, Warden, Respondent.	*	CASE NO. S97R1412 ON APPEAL FROM THE SUPERIOR COURT OF BUTTS COUNTY

RESPONSE TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

THURBERT E. BAKER
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Assistant Attorney General

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(404) 656-5734

IN THE SUPREME COURT OF GEORGIA
STATE OF GEORGIA

EXZAVIOUS LEE GIBSON,	*	
Petitioner,	*	CASE NO. S97R1412
v.	*	ON APPEAL FROM THE SUPERIOR COURT OF BUTTS COUNTY
TONY G. TURPIN, Warden,	*	
Respondent.	*	

RESPONSE TO APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Comes now Tony G. Turpin, Warden, Respondent in the above-styled appeal from the denial of habeas corpus relief and files this his response to Petitioner's application for a certificate of probable cause to appeal, showing and stating as follows:

PART ONE

STATEMENT OF THE CASE

Petitioner, Exzavious Lee Gibson, was tried in the Superior Court of Dodge County on charges of malice murder and armed robbery. (Direct Appeal Record (hereinafter "D.R.") p. 1). Petitioner was represented pre-trial, at trial, and on appeal by attorney W. Dennis Mullis of Cochran, Georgia. The trial of Petitioner's case was conducted June 11 through 14, 1991. The jury found Petitioner guilty of malice murder and armed robbery. (D.R.

p. 1). Following the sentencing phase of trial, the jury found the existence of two statutory aggravating circumstances, and Petitioner was sentenced to death for malice murder. (D.R. p. 4, 5). Petitioner received a sentence of life imprisonment for armed robbery. (D.R. p. 7).

Petitioner's motion for new trial was denied on January 4, 1991. (D.R. p. 201). Petitioner appealed to this Court, which affirmed his convictions and sentences on June 10, 1991. *Gibson v. State*, 261 Ga. 313, 404 S.E.2d 781 (1991). The United States Supreme Court denied certiorari on February 24, 1992. *Gibson v. Georgia*, 502 U.S. 1101, 112 S.Ct. 1188 (1992) *reh. denied* 503 U.S. 999, 112 S.Ct. 1708 (1992).

On December 20, 1995, with no pending execution date, Petitioner filed a pro se state habeas corpus petition which had been prepared by the Georgia Appellate Practice and Resource Center (hereinafter the "Resource Center") on Petitioner's behalf. (R. 2, Attachment to Petition, p. 1). Respondent filed his answer and thereafter moved for entry of a scheduling order, advocating adoption by the habeas corpus court of the timelines promulgated by the Superior Court Judges Counsel, set forth in U.S.C.R. 44, and adopted by this Court on December 15, 1995, as contemplated by O.C.G.A. § 9-14-47.1(c), to govern first-time capital state habeas corpus petitions filed on or after January 1, 1996. While acknowledging the petition in the instant case was filed prior to January 1, 1996, Respondent suggested that the habeas corpus court excercise [sic] its inherent power to control the orderly progress of litigation pending before it by issuing a scheduling order adopting the timelines set forth in Rule 44. (R. 8). On February 8, 1996, stating its purpose to control the

orderly progress of litigation and facilitate a fair and orderly resolution of the issues, the habeas corpus court entered a scheduling order establishing deadlines for the filing of motions by the parties and for any amendments to the petition in accordance with the guidelines set forth in Uniform Superior Court Rule 44, (R. 9), guidelines which the Resource Center was well aware of when it filed the petition in this case. (*See, e.g.*, Petitioner's Application for Certificate of Probable Cause to Appeal (hereinafter "Application for CPC") p. 5, "The purpose of filing [December 20,] 1995 was to avoid the expedited procedures under Rule 44 that took effect for petitions filed on or after January 1, 1996.").

The Resource Center refused to enter an appearance on Petitioner's behalf in this case. Instead, during the months of February, March, April, May, June, July, and August of 1996, when it could have been preparing Petitioner's case for a hearing, the Resource Center filed six (6) separate motions as amicus curiae counsel seeking to postpone indefinitely the progress of Petitioner's case. The Resource Center cited as the basis for such a postponement the fact that Petitioner was not represented by counsel, a situation which Petitioner and the Resource Center themselves had contrived by the voluntary and unprompted filing of this petition. (R. 10, 15, 18, 21, 23, 24).

No amendments to the petition were filed, and the habeas corpus court scheduled an evidentiary hearing for August 22, 1996, (R. 19) and later rescheduled the hearing, at the oral request of the Resource Center during a telephone conference among the habeas corpus court, counsel for Respondent, and Ms. M. Elizabeth Wells, of

the Resource Center, to September 12, 1996 on the claims Petitioner raised in his original petition. (R. 27).

Ms. Wells of the Resource Center, who had been involved throughout the progress of this case as amicus curiae counsel, was present in the courtroom on September 12, 1997, and on several occasions during the proceedings addressed the Court on Petitioner's behalf. (T. 3-16, 28, 67-68). However, Ms. Wells steadfastly refused the habeas corpus court's entreaties to enter an appearance on Petitioner's behalf in the absence of a pre-appearance bargain for guaranteed additional time. (T. 3-16).

On March 11, 1997, the habeas corpus court entered an order denying Petitioner habeas corpus relief. On March 20, 1997, Petitioner filed his Notice of Appeal in the Superior Court of Butts County. On March 20, 1997, the law firm of King & Spalding entered its appearance in this Court on Petitioner's behalf and, following an extension of time, on May 27, 1997 filed Petitioner's Application for CPC.

This response is filed in response to said Application for CPC.

PART TWO

STATEMENT OF FACTS

The facts of Petitioner's case, as found by this Court in its opinion on direct appeal, are as follows:

> The victim operated a family-owned grocery store in Eastman. Late in the afternoon of February 2, 1990, Eastman's chief of police, driving by the store during a routine patrol, saw a crowd at

the front entrance. A man ran to the chief's car and reported there was blood all over the store and no one visible inside. The chief radioed for assistance and then approached the store. The main entrance was locked. A member of the victim's family broke open a side door. The police chief entered the store and discovered the victim's body "behind the counter and blood just totally everywhere."

A man had been seen running away from the store. One of the women in the crowd recognized him and knew where [sic] lived. She accompanied a police officer to the defendant's home. Leaving her in the car, the police officer went to the door, knocked, and asked permission to enter. A woman answered, telling the officer to come in. He opened the door and immediately noticed drops of fresh blood on the floor in the living room. The officer asked the woman if anyone had run into the house. She answered "her grandson" and directed him to a bedroom down the hall. The officer went to the bedroom. Looking from the doorway, he saw bloody money under the bed. The officer went to the bed and looked under it, thinking the defendant might be hiding there, and saw the rest of the money (almost $500) and a wallet. He looked inside the wallet and determined that it belonged to the victim. Looking around, he saw some bloody clothes near a closet which fit the description of the clothing worn by the man seen running away from the store. The officer opened the closet door and found the defendant, "crouched down" and sweating profusely. He was arrested and taken to jail.

An autopsy was conducted on the body of the victim. He had been cut numerous times; some of the cuts were very deep while others were shallow. The autopsist testified that he found 39 "stab and slash and superficial cut wounds on [the victim's] body." The knife blade had broken off in the vertebrae of the victim's neck, severing the victim's spinal cord and immediately paralyzing him from the neck down. In the autopsist's opinion, many of the superficial wounds in the front of the victim's chest and neck were inflicted by what was left of the knife after it had broken in the victim's neck.

The defendant confessed shortly after he was arrested. He first gave a written statement in which he acknowledged killing the victim, claiming he needed money for drugs. Later that evening, he gave a longer tape-recorded statement, in which he added that he had been in the store earlier that day and had used profanity in the presence of the victim, who had then lectured him about his behavior. The defendant stated that when he returned later, he intended not only to rob the victim but also "to hurt him" because "I didn't like him."

Gibson, 261 Ga. at 313-314.

PART THREE

ARGUMENT AND CITATION OF AUTHORITY

THE HABEAS CORPUS COURT PROPERLY DISPOSED OF THE CASE BELOW APPLYING WELL-ESTABLISHED PRECEDENT.

A. THE FINDINGS AND CONCLUSIONS OF THE HABEAS CORPUS COURT ARE LEGALLY CORRECT AND SUPPORTED BY THE RECORD, AND THERE IS NO BASIS FOR AUTHORIZING A REMAND.

The record in this case confirms that the habeas corpus court correctly applied established habeas corpus principles and established legal precedent on the issues of effectiveness of counsel, prosecutorial misconduct, and the constitutionality of the Unified Appeal Procedure in denying relief in Petitioner's case. There is no arguable merit to the claim that the habeas corpus court's findings of fact were clearly erroneous and its conclusions of law were contrary to and an unreasonable application of clearly established state and federal law.

The record in this case is sufficient to resolve Petitioner's habeas corpus claims and supports the denial of habeas corpus relief. Petitioner's failure to present evidence to support his habeas corpus claims, allegedly because of his lack of counsel, does not authorize a remand of this case since, as discussed below, Petitioner voluntarily filed this case pro se.

B. THE HABEAS CORPUS COURT PROPERLY APPLIED THE DIRECTIVES OF THIS COURT IN *DAVIS V. THOMAS* TO THE FACTS OF THIS CASE.

This case exemplifies the proper and appropriate exercise by a habeas corpus court of its "broad discretion" to control its calendar by refusing a request for continuance prompted by "unpreparedness [and] the lack of due diligence." This case therefore presents no basis for the granting of a Certificate of Probable Cause to Appeal.

This Court confirmed that very discretion during the pendancy of Petitioner's case in the habeas corpus court below in the context of an interlocutory appeal in a capital state habeas corpus case. In *Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996), this Court recognized the "broad discretion" of the habeas corpus court to manage its court calendar, acknowledged the absence of a right to appointment of counsel in a habeas corpus proceeding, and cautioned that a habeas corpus court would act properly in refusing a request for continuance prompted by unpreparedness or lack of due diligence.

In Petitioner's case, the habeas corpus court was faced with just such "unpreparedness" and "lack of due diligence" when, in the absence of any execution date or other prompting by the State, Petitioner and the Resource Center filed a capital state habeas corpus petition on December 20, 1995. The filing of this petition constituted an undisguised attempt to thwart the efforts of the General Assembly, the Council of Superior Court Judges, and this Court to ensure, through the enactment of O.C.G.A.

§ 9-14-47.1 and the promulgation and adoption of Uniform Superior Court Rule 44, (hereinafter "USCR 44"), that "the writ of habeas corpus in state courts [ ] not be used by defendants upon whom the death penalty has been imposed solely as a delaying tactic under the guise of asserting rights, seeking remedies, or raising objections and challenges to their convictions and sentences." (Ga. L. 1995, p. 381 § 2).[1]

Petitioner and the Resource Center voluntarily filed the December 20, 1995 pro se petition in this case for the admitted purpose of avoiding the time limits of USCR 44 and were therefore obviously aware of those new time guidelines before the decision to file the petition. In light of the transparent manuevering and gamesmanship by the Resource Center in filing eleven (11) "pro se" petitions in one day just before the official implementation date of USCR 44, the fact that Respondent would attempt to ensure that the newly-filed petitions would be litigated under the same time schedule as set forth in USCR 44 and without undue delay could not have come as a surprise to the Resource Center.[2]

---

[1] In fact, in its desire to avoid any statutes or court rules which might hamper its ability to delay the progress of death penalty cases in Georgia, the Resource Center filed habeas corpus petitions on December 20, 1995 in two cases in which the convictions were not even yet final and the consideration of which was therefore clearly and indisputably premature under established habeas corpus law. (*Crowe v. Thomas*, Butts Co. Case No. 95-V-655, and *McMichen v. Thomas*, Butts Co. Case No. 95-V-653).

[2] Petitioner and the Resource Center were given formal notice, through Respondent's February 5, 1996 Motion for Entry of Scheduling Order, that Respondent was seeking such a schedule.

If the true intent of the Resource Center was to ensure that Petitioner was represented by counsel in his state habeas corpus proceedings, the Resource Center would not have filed a pro se petition in Petitioner's case on December 20, 1995.

Likewise, there is no justification for the demands below that the petition not go forward as long as the petitioner is pro se where the petition was deliberately filed pro se. Having initiated this action and set in motion the working of the judicial system, Petitioner and the Resource Center had no justifiable expectation that the petition they filed would not then proceed. Petitioner and the Resource Center certainly had no right to expect that they were entitled to delay indefinitely the progress of Petitioner's case and utilize the habeas corpus court as the unwitting vehicle of such improper delay.

Moreover, if its true intent was to ensure that Petitioner was represented by counsel, the Resource Center was fully capable of entering an appearance of Petitioner's behalf. Petitioner's conviction had been final for over three (3) years at the time his habeas corpus petition was filed. As counsel for Respondent in all of the capital state habeas corpus cases, counsel for Respondent here states upon information and belief that the Resource Center, at the time of Petitioner's habeas corpus hearing, was sole counsel in only ten (10) capital state habeas corpus cases and that in the time period from January 1994 through the date of Petitioner's September 12, 1996 evidentiary hearing in this case, the Resource Center was sole counsel in only one (1) state habeas corpus evidentiary hearing.

If its true intent was to ensure that Petitioner was represented by counsel, the choice of the Resource Center in this case to concentrate its efforts, from December 20, 1995 until September 12, 1996, on filing amicus curiae motions for indefinite continuances instead of substantively preparing to litigate Petitioner's case is inexplicable.

If its true intent was to ensure that Petitioner was represented by counsel, the Resource Center could have entered an appearance as counsel in Petitioner's case and thereafter sought additional time to prepare Petitioner's case. Another attorney at the Resource Center, Stephen C. Bayliss, in fact undertook just such a course in *Lynd v. Turpin*, Case No. 95-V-646, another of the "pro se" petitions filed December 20, 1995. Mr. Bayliss entered an appearance as counsel, not amicus curiae counsel, for the petitioner in that case just one month before that case was scheduled for its evidentiary hearing. He entered his appearance with the filing of a motion for extension of time; however, he did not at the time he entered that appearance have any assurances from the habeas corpus court in that case that his motion for extension of time would be granted.

The habeas corpus court in Petitioner's case invited Ms. Wells of the Resource Center to make a similar entry of appearance on Petitioner's behalf at which point, the court assured Ms. Wells, it would reconsider the Resource Center's motion in the case for additional time. The following colloquy then ensued:

> THE COURT: Just a minute, please. Just a minute. Would you like to represent Mr. Gibson?

MS. WELLS: Your Honor. Your Honor is –

THE COURT: Just answer –

MS. WELLS: I'm answering your question.

THE COURT: Just answer yes or no.

MS. WELLS: If you will give us time, the answer is yes.

THE COURT: Do you want to make an appearance for Mr. Gibson?

MS. WELLS: Your Honor –

THE COURT: Let me tell what's wrong with what you have done.

MS. WELLS: I recognize –

THE COURT: You know, I've been on vacation. I think Ms. Whitaker has been on vacation. You've been on vacation. Mr. Gibson has been in jail. You have had ample opportunity to do anything you wanted to do in this case and have failed to do that. Now, I am not so sure that you are – are you capable of representing him, if you handle it the way you have handled it so far.

MS. WELLS: Your Honor.

THE COURT: I have some great concern about that.

MS. WELLS: With our caseload, we are presently not capable of representing Mr. Gibson.

THE COURT: Well, then –

MS. WELLS: We would do it in a heart beat, if we could.

THE COURT: You've had four years to do it.

MS. WELLS: Your Honor, we have requested, over and over and over, to be heard on this and Your Honor has not granted us even an opportunity to be heard on this.

THE COURT: I've read all of your – what are you going to tell me different than is in your pleadings?

MS. WELLS: Your Honor, I'm going to try to make you see that this is – that nobody has ever proceeded in a modern death penalty in Georgia without counsel.

THE COURT: I understand that.

MS. WELLS: That this is ridiculous. That Mr. Gibson has a right –

THE COURT: Why didn't you –

MS. WELLS: – to a writ of habeas corpus.

THE COURT: You've had four years to represent him. Why didn't you get in here and represent him?

MS. WELLS: We have not had four years to represent him. That's just absolutely ludicrous, Your Honor. That's certainly – and the records will support that.

THE COURT: You've been in this case. You've had time to go to Europe, haven't you?

MS. WELLS: Absolutely, Your Honor, and –

THE COURT: And yet you didn't have time to represent Mr. Gibson.

MS. WELLS: I don't think those two weeks would have made a difference in whether or not Mr. Gibson's case was properly prepared.

THE COURT: That's –

MS. WELLS: I've worked on this – if you want to talk about my personal life –

THE COURT: No, I don't want to talk about it, I'm just saying –

MS. WELLS: You apparently do.

THE COURT: I think if you would have put the time on the case maybe you could have represented him, but I have some serious concern that if you think it is more important to do that than to take up this case, whether you could adequately represent him or not.

MS. WELLS: I have worked fourteen hours days for the last two weeks. I have worked almost every weekend since last September, 1995. This is ludicrous to find that because I went to England for two weeks I an waiving Mr. Gibson's right to an attorney.

THE COURT: No, all I'm saying –

MS. WELLS: He –

THE COURT: All I am saying to you, is that if it is so important for him to have – that you can't – for you to get him a lawyer, why didn't you stay here and try to do that?

MS. WELLS: Your Honor, I have attorneys. I have told the Court there are attorneys lined up who will take Mr. Gibson's case if Your Honor will allow him an opportunity to meet with Your Honor and discuss a Scheduling Order prior to the entry of appearance. These attorneys cannot afford to enter an appearance and be ordered to file something within a month.

THE COURT: What does the State want to tell me?

MS. WHITAKER: Your Honor, I would add that under the Uniform Superior Court Rule adopted by the Georgia Supreme Court in January of this year and passed in December of this year, in (sic) which the Respondent again believes, was what prompted the filing of this petition in the first place. The time lines provided are that an evidentiary hearing should be held within six months of the filing of the petition. The petition was filed in December of 1995, and as the Court is aware, it has already been nine months, so any, any protestations from the Resource Center that they have not had sufficient time given the case was final in 1992, we believe are inaccuracies at this point.

MS. WELLS: Your Honor, as the State has conceded, this was filed prior to the Rule 44. It's not – Rule 44 does not dictate the scheduling guidelines in this case. The Georgia Constitution allows Mr. Gibson the writ of habeas corpus, a guaranteed –

THE COURT: Please, Ms. Wells. Ms. Wells. Don't repeat anything you've already told me in all of these briefs you've filed. Okay? I mean, I've read them all. I've been through it.

MS. WELLS: Your Honor, this is a complete denial of due process. This is making a mockery of the system.

THE COURT: You've argued that point. You've argued that point.

MS. WELLS: Your Honor, I submit if you would have allowed the hearing back when we

filed the first Amicus motion, we may be proceeding on this. We cannot – we are understaffed. We have two attorneys at the Georgia Resource Center who can enter into State Court.

THE COURT: Well, the record reflects what times have been spent doing what. It reflects the time that the petition has been filed; how long everything has been pending. Ms. Wells, in all due respect, the thing has had adequate time to be thoroughly investigated and reviewed, if you wanted to do that.

MS. WELLS: Your Honor, that is simply not true.

THE COURT: With all due respect.

MS. WELLS: That is simply not true.

THE COURT: Well, then what do you think is a good time – years?

MS. WELLS: No, Your Honor. I will tell you what. Various courts – there were thirteen pro se petitions – there were thirteen inmates proceeding pro se in January of this year. Various courts have allowed counsel on them. They have had scheduling orders. One Judge allowed nine months; one Judge allowed six months. The Resource Center has been willing to meet with these Courts to attempt to find counsel or to enter an appearance. We have repeatedly told the Court that that's our desire to do so in Mr. Gibson's case. We don't think that the system benefits by having this inmate go through without counsel. We think that it makes a mockery of the system. We –

THE COURT: Didn't I ask you yesterday, didn't I ask you yesterday on the telephone, did you want to represent him?

MS. WELLS: Your Honor, I have told you –

THE COURT: And what did you tell me?

MS. WELLS: – we will represent him with time.

THE COURT: Yes.

MS. WELLS: I said with adequate time.

THE COURT: Well, let me ask you this, did I ask you that back when you first filed your Amicus brief, did you want to represent him?

MS. WELLS: No, Your Honor.

THE COURT: What did you tell me then?

MS. WELLS: No, Your Honor, you did not tell me that.

THE COURT: Well, what have you told me in your briefs?

MS. WELLS: Well, I have asked – I have requested time so we can come on to represent this client. I have requested repeatedly that we be allowed time to represent this inmate adequately. We are bound by ethical rules to competently represent someone.

THE COURT: Do you want to step up here and have a seat next to him as his lawyer?

MS. WELLS: Your Honor, if you will give time. I mean it is ludicrous to expect a hearing to go forth.

THE COURT: Ms. Wells. Ms. Wells.

MS. WELLS: I haven't read the record in this case. I know nothing about this case.

THE COURT: Ms. Wells. Ms. Wells.

MS. WELLS: Yes, Your Honor.

THE COURT: Do you want to represent him? I am not going to tell you what I am going to do, but if you want to represent him, sit down in the chair, make an appearance in this Court or please be seated.

MS. WELLS: Your Honor, you know I want to represent him I have said it every way I can say it. To sit down here and have the Court say, conduct the hearing when I have never spoken with Mr. Mullis, I have never read the record. I know nothing about this case. That would make a mockery of it. Your Honor, I think –

THE COURT: You have filed a lot of papers not to have read the file.

MS. WELLS: Those papers do nothing but recite the history of the death penalty and what's going on and what our attempts are to find counsel.

THE COURT: I will give you the opportunity right now to have a seat with him as his lawyer or please sit down.

MS. WELLS: Your Honor, I, just to put on the record that I would like to enter an appearance, but I cannot do so without the Court discussing what the scheduling limitations are going to be.

THE COURT: I am not going to make any deals, Ms. Wells. If you want to represent him, have a seat. If not, sit down.

MS. WELLS: Well, Your Honor, this is a complete denial of Mr. Gibson's rights.

THE COURT: Come up here and help him.

MS. WELLS: Help him what? Help this Court deny him all of his rights?

THE COURT: Don't sit – all you have done is sit outside the bar and throw stones.

MS. WELLS: Your Honor –

THE COURT: Get inside the bar and do something.

MS. WELLS: Your Honor, the record will show that we have entered appearances on a number of cases; that we have found counsel on a number of cases.

THE COURT: Well, I am not in those cases, Ms. Wells, and all I have gotten is stones thrown, and all I am saying is either come here and represent him, you are welcome [sic] come and sit down and represent him, and we will proceed and I will listen to your motions, and I am not going to tell you how I am going to rule on them. I am not going to predecide the case. But if you want to represent him, have a seat. If not, please sit down, and let me go forward.

MS. WELLS: Your Honor, I don't understand why we can't just discuss what a scheduling order would be prior to that. I certainly have no confidence that we won't have to proceed with the hearing today. I can't enter –

THE COURT: Well, let me ask you this –

MS. WELLS: I cannot competently –

THE COURT: If I sit down and discuss the scheduling order and you don't like it then, you ain't going to do anything so, I mean, if you want to represent him, I'll say it again, have a seat next to him, make an appearance or, please, let me go forward.

MS. WELLS: Your Honor, this is a mockery of justice.

THE COURT: You have told me that.

MS. WELLS: Yes, Your Honor, well, I just don't think you are aware of that.

THE COURT: I am very aware of what –

MS. WELLS: This is ridiculous. Mr. Gibson may as well be hung from a tree out back. This is just ridiculous.

THE COURT: I judge you are not going to represent him, is that correct?

MS. WELLS: Your Honor, I will enter an entry of appearance if Your Honor will discuss a scheduling order. I simply cannot do it.

THE COURT: I am not going to take –

MS. WELLS: I mean, I am supposed to be in another court.

THE COURT: It would not be fair. It would not be fair to Mr. Gibson to have your (sic) make a conditional appearance with him. If this man needs a lawyer, if you think he needs a lawyer, be his lawyer. If you don't, don't, don't say, I am only going to represent him. If he needs a lawyer so bad, don't tell him you are going to represent him only if he does certain things, only if the Courts do certain things. It is not fair to him. Either get in the case or get out.

MS. WELLS: Your Honor, it is not fair to him to come on a case and not be given an opportunity to investigate and present his issues.

THE COURT: It is better than to have some lawyer get in the case and then turn around and desert him, because they don't get what they want.

MS. WELLS: Your Honor, I am not talking about turning around and deserting him. I am talking about not coming on the case until we discuss whether or not there is adequate time to investigate and present this case.

THE COURT: I understand your position, and I will again offer you the opportunity to come up here and represent him or please have a seat and let me proceed.

MS. WELLS: Well, Your Honor, I would respectfully submit that that is an empty offer.

THE COURT: Okay. Thank you. Okay. Anything else on behalf of Mr. Gibson. Anything else Mr. Gibson wants to tell me after that conversation?

MR. GIBSON: No, sir.

9/12/96 T. 5-16.

As the foregoing and an examination of the record in this case and the transcript of the entire hearing, including Petitioner's statements to the court therein, clearly establishes, the habeas corpus court acted well within the proper exercise of its discretion in proceeding with the habeas corpus evidentiary hearing. A close review of the habeas corpus court's conduct of this matter demonstrates his appropriate concern for the Petitioner and his

pro se status and his willingness, even at the last minute, to entertain a reasonable solution under the circumstances.

Unless the court was willing to abdicate its control over the progress of the proceeedings [sic] to Petitioner and the Resource Center, the court was left with no viable alternative to proceeding with the evidentiary hearing. In a proper exercise of his judicial authority, the habeas corpus court repeatedly offered the Resource Center the opportunity to enter an appearance, at which point all of their motions for additional time would be considered anew as being offered by counsel for Petitioner. The only action which the habeas corpus court refused to take, as was reasonable, was to predecide the motions before counsel entered an appearance. (9/12/96 T. 13). Given the Resource Center's insistence that the court predecide the motions before it would agree to enter an appearance, the court's only option, other than to capitulate, was to proceed.

This case presents no basis for the granting of this Application for Certificate of Probable Cause. The habeas corpus court in this case followed the clear directives of this Court in *Davis v. Thomas*, issued during the pendancy of Petitioner's case, confirming that there is no right to counsel in a capital state habeas corpus case and that the habeas corpus court retains "broad discretion" to control the progress of capital state habeas corpus cases pending before it. In proceeding with the evidentiary hearing in this case, the habeas corpus court applied this Court's instruction that it would be a proper exercise of the habeas corpus court's discretion to deny requests for

continuances prompted by unpreparedness or the lack of due diligence.

The effect of this Court's granting of this Application for CPC in the factual context of this case would be to send a clear message to all habeas corpus courts and capital litigants that, despite the plain language of *Davis*, the habeas corpus courts in fact have no discretion and must relinquish all control over the progress of post-conviction capital litigation to capital litigants and grant continuances as a matter of course to the Resource Center or any capital post-conviction petitioner.

Given this Court's recent affirmation in its adoption of USCR 44 of the need to eliminate unwarranted delay in capital post-conviction proceedings, the granting of this application would undermine the efficacy of USCR 44 and have the unintended result of promoting, rather than minimizing delay.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Respondent respectfully requests that this Court deny this Application for Certificate of Probable Cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States mail, properly addressed upon:

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This 6th day of June, 1997.

/s/ Paige Reese Whitaker
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Assistant Attorney General by SVB

MOTION FILED
SEP - 8 1999

(6)

No. 99-77

IN THE
Supreme Court of the United States

Exzavious Lee Gibson,

Petitioner,

v.

Tony G. Turpin, Warden,
Georgia Diagnostic and Classification Center,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Georgia

MOTION OF THE AMERICAN BAR ASSOCIATION TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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SEPTEMBER 8, 1999

29 pp

No. 99-77

IN THE

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Exzavious Lee Gibson,

Petitioner,

v.

Tony G. Turpin, Warden
Georgia Diagnostic And Classification Center,

Respondent.

MOTION OF THE AMERICAN BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The American Bar Association ("ABA") respectfully moves for leave to file the accompanying brief as *amicus curiae* pursuant to Rule 37.2(b) of the Rules of this Court. Petitioner has consented to the filing of this brief. Respondent has refused consent.

INTEREST OF THE AMERICAN BAR ASSOCIATION

The ABA is a voluntary national membership organization of the legal profession. In several different ways, the ABA has taken a very active role in capital punishment issues. Although it has not taken a position on the constitutionality of the death

penalty in cases not involving juveniles or the mentally retarded, the ABA has made the right to effective assistance of counsel in *all* capital cases and the preservation of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g.*, ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989); ABA *Standards for Criminal Justice* (2d ed. 1980).

The ABA has adopted policy statements and issued reports urging specific reforms in federal and state post-conviction procedures. In 1989, an ABA task force conducted a nationwide study of death penalty *habeas* practice and procedures. Based upon the task force's report and recommendations, the ABA adopted in 1990, by overwhelming vote, a comprehensive policy statement urging legislative reform of *habeas* procedures, both state and federal, to make them more efficient and better able to address the merits of the fundamental claims many post-conviction petitions raise in capital cases. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases,* 40 Am. U. L. Rev. 1 (1990) (task force report).

Simultaneous with this review, the ABA House of Delegates adopted *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, to "amplify previously adopted Association positions on effective assistance of counsel in capital cases." These Guidelines were intended to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." *Resolution of the ABA House of Delegates* 122 (1989).

On February 3, 1997, the ABA House of Delegates adopted a resolution calling for each jurisdiction that imposes

the death penalty to impose a moratorium on executions until the jurisdiction implemented policies and procedures -- including, *inter alia,* adherence to the *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* -- to ensure that the death penalty is administered fairly and impartially and to minimize the risk that innocent persons may be executed. *See Resolution of the ABA House of Delegates* 107 (1997).

The issue in this case is whether it was constitutional for the State of Georgia to provide *no* counsel to an indigent, death row inmate for his first state *habeas* proceeding, where he sought to raise claims that could not have been raised on direct appeal. That issue is of particular and immediate concern to the ABA. The ABA is directly involved in efforts to secure competent counsel for death row inmates in post-conviction proceedings. In 1983, several Sections of the ABA jointly requested and received programmatic approval for an ABA "post-conviction death penalty representation project" designed to help provide volunteer legal representation for indigent death row inmates. The goals of the resulting ABA Death Penalty Representation Project are to better inform the bar and the public about the lack of representation available to death row inmates, to address this urgent need by recruiting competent volunteer attorneys, and to offer training and assistance to those attorneys. The Project is the only organization working on a nationwide basis to help secure post-conviction counsel for indigent death row inmates. The ABA thus is in a unique position to provide information to the Court concerning the lack of availability of counsel to assist death row inmates in connection with the critical claims at issue in this case: initial state *habeas* claims that could not have been brought on direct appeal.

CONCLUSION

For these reasons, the ABA respectfully urges the Court to grant this motion for leave to file the accompanying brief as *amicus curiae* in support of the position of the Petitioner.

Respectfully submitted,

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September 8, 1999

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BRIEF OF *AMICUS CURIAE* AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is a voluntary national membership organization of the legal profession.[1] Its more that 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students and a number of "non-lawyer" associates in allied fields.[2]

Although the ABA has not taken a position on the constitutionality of the death penalty in cases not involving juveniles or the mentally retarded, the ABA has made the right to effective assistance of counsel in *all* capital cases and the preservation of *habeas corpus* a priority. The ABA promulgates standards and guidelines for the effective representation of criminal defendants, with particular emphasis upon representation in capital cases. *See, e.g.*, ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989); ABA *Standards for Criminal Justice* (2d ed. 1980).

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[1]Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of the brief.

[2]Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

The issue in this case is whether it was constitutional for the State of Georgia to provide *no* counsel to an indigent, death row inmate for his first state *habeas* proceeding, where he sought to raise claims that could not have been raised on direct appeal. That issue is of particular and immediate concern to the ABA. As described further below, the ABA is directly involved in efforts to secure competent counsel for death row inmates in post-conviction proceedings. In 1983, several Sections of the ABA jointly requested and received programmatic approval for an ABA "post-conviction death penalty representation project" designed to help provide volunteer legal representation for indigent death row inmates. The goals of the resulting ABA Death Penalty Representation Project are to better inform the bar and the public about the lack of representation available to death row inmates, to address this urgent need by recruiting competent volunteer attorneys, and to offer training and assistance to those attorneys. The Project is the only organization working on a nationwide basis to help secure post-conviction counsel for indigent death row inmates. The ABA thus is in a unique position to provide information to the Court concerning the lack of availability of counsel to assist death row inmates in connection with the critical claims at issue in this case: initial state *habeas* claims that could not have been brought on direct appeal.

SUMMARY OF ARGUMENT

On September 12, 1996, a death row inmate named Exzavious Gibson stood alone in a Georgia courtroom.[3] The occasion was a state *habeas corpus* hearing that represented his first opportunity to present evidence in support of several constitutional claims. One of the most significant of those

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[3]The ABA adopts the statement of proceedings in the petition for certiorari.

claims was a Sixth Amendment claim of ineffective assistance of trial counsel that Gibson could not have brought on direct appeal. Because no volunteer lawyer had been found to assist him, Gibson's claims were presented in a form petition having nothing to do with the facts of his case. Because a lawyer still had not been found by the time of the hearing, and because the state judge would not grant a continuance to allow the Georgia Resource Center additional time to assume the representation, Gibson was forced to act as his own lawyer at the hearing. He presented no evidence. He asked no questions of the only witness. He made no objections and offered no argument. After the hearing, the judge adopted the State's proposed findings verbatim and dismissed the petition. For all practical purposes, Gibson's post-conviction claims have never been heard.

This case presents a narrow but critical question: whether an indigent death row inmate has a constitutional right to counsel to pursue initial state *habeas* claims, particularly where, as here, those claims could not have been raised on direct appeal. Exzavious Gibson could not secure a lawyer to pursue such claims: he could not afford to hire one, the State did not provide one, and he was unable to find volunteer counsel. The question in this case thus was not answered in either *Murray v. Giarratano*, 492 U.S. 1 (1989), or *Coleman v. Thompson*, 501 U.S. 722 (1991). Writing separately (and casting the deciding vote) in *Giarratano*, Justice Kennedy emphasized that "[i]t cannot be denied that collateral relief proceedings are a central part of the review process for prisoners sentenced to death," and that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." *Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment). The facts in *Giarratano*, however, revealed that

"no prisoner on death row in Virginia has been unable to obtain counsel to represent him in postconviction proceedings." *Id.* (Kennedy, J., concurring in the judgment). Similarly, in *Coleman*, where the Court reserved the precise question presented by this case, the death row inmate had been able to secure counsel for his initial state *habeas* proceeding. *Coleman*, 501 U.S. at 755.

It is the experience of the ABA that petitioner is not alone in his inability as a death row inmate to secure counsel to pursue inital state *habeas* claims. As a result of Congress' recent withdrawal of federal funding from the death penalty "resource centers," and its enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, there is a critical shortage of counsel for death row inmates once direct appeal has concluded. Many States have failed to establish an appointment mechanism to provide qualified lawyers, and it is increasingly difficult to find volunteer lawyers. There are now numerous persons on death row who do not have a lawyer to help them file their initial state *habeas* petitions. The consequences are enormous. One of the most significant claims generally raised for the first time on *habeas* -- ineffective assistance of trial counsel -- cannot be evaluated *without* a lawyer. *See Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986). And *habeas* claims have been successful in a staggering percentage of death penalty cases. *See Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting).

There is a substantial constitutional foundation, arising from both the equal protection and due process jurisprudence of this Court, for recognition of a right to counsel for death row inmates to pursue initial state *habeas* claims. Nowhere is that right more compelling than where, as here, the claims could not have been raised on direct appeal and the indigent death row inmate has never had a lawyer to pursue them. Each of the

Court's decisions concerning the rights of indigent parties to counsel reflects an assessment both of the importance of the underlying interest at stake and the extent to which counsel is necessary to protect the rights of the indigent party. *See, e.g., Douglas v. California*, 372 U.S. 353, 356-58 (1963); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27-28 (1981); *Gagnon v. Scarpelli*, 411 U.S. 778, 785-87 (1973). Employing that framework here, recognition of a right to counsel in the circumstances presented by this case is compelling: there are few interests more substantial than the fair administration of the death penalty, and few instances in which the assistance of a lawyer is more indispensable than the pursuit of initial state *habeas* claims, including ineffective assistance of counsel, that could not have been raised on direct appeal. The ABA therefore urges the Court to grant the petition.

ARGUMENT

THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER AN INDIGENT DEATH ROW INMATE HAS A CONSTITUTIONAL RIGHT TO COUNSEL IN INITIAL STATE *HABEAS* PROCEEDINGS.

The ABA urges the Court to grant the petition because this case presents a constitutional question of critical importance to the fair administration of our nation's capital punishment system.

I. Certain Constitutional Claims Can Be Raised Only in State Post-Conviction Proceedings, and Many Death Row Inmates Currently Have No Lawyer to Assist Them with Such Claims.

A. For certain claims, state collateral review is the equivalent of direct appeal.

Because he was represented by his trial counsel on direct appeal, Exzavious Gibson was barred from raising his Sixth Amendment ineffective assistance of counsel claim until state collateral review. *See Berry v. State*, 422 S.E.2d 861, 863 (Ga. 1992). Such procedural bars are common. *See, e.g.*, Okla. Stat. tit. 22, § 1089(D)(4)(b) (1-2). Indeed, as a practical matter, it is virtually always the case that ineffective assistance of counsel claims cannot be raised until collateral review. As this Court has recognized, "[i]n general, no . . . meaningful opportunity exists for the full and fair litigation of a *habeas* petitioner's ineffective-assistance claims at trial and on direct review," *Kimmelman*, 477 U.S. at 378 n.3, and "collateral review will frequently be the only means through which an accused can effectuate the right to counsel." *Id.* at 378. As explained in *United States v. Galloway*, 56 F.3d 1239 (10th Cir. 1995) (en banc), ineffective assistance of counsel claims brought on direct appeal "are presumptively dismissible" because "[a] factual record must be developed." *Id.* at 1240.

Other important constitutional claims also typically require investigation outside the trial record and cannot be brought on direct appeal. Indeed, "some irregularities, such as prosecutorial misconduct, may not surface until well after the direct review is complete." *Giarratano*, 492 U.S. at 24 (Stevens, J., dissenting). In Georgia, a defendant does not have a right to review prosecution and law enforcement files, where evidence of a failure to disclose exculpatory evidence is most

likely to be found, until direct review is complete. *See* Ga. Code Ann. § 50-18-72(4); *see also Brady v. Maryland*, 373 U.S. 83, 90-91 (1963) (requiring the state to disclose exculpatory evidence); *Amadeo v. Zant*, 486 U.S. 214, 216-17 (1988) (upholding finding that claim of prosecutorial misconduct was not reasonably discoverable prior to collateral review). Similarly, claims of jury misconduct or tampering often cannot be discovered until after trial. *See, e.g., State v. Freeman*, 605 So. 2d 1258 (Ala. Crim. App. 1992) (juror misconduct found on collateral review, based on post-trial investigation).

Thus, for certain constitutional claims, collateral review is the equivalent of direct appeal; it is the first time a reviewing court may consider a particular constitutional challenge to the conviction and sentence. Moreover, the claims that typically fall into this category are among the most significant in maintaining the integrity of the judicial process in cases where the ultimate punishment of death is sought. These claims, when found to have merit, necessarily implicate the integrity of the trial outcome. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); *Strickler v. Greene*, 119 S. Ct. 1936, 1952 (1999) (requiring, for *Brady* claim, a "reasonable probability that the result of the trial would have been different if the suppressed [material had been] disclosed to the defense"). These claims thus are not concerned with mere technicalities or procedural niceties; rather, they relate directly to the reliability of the underlying verdict and death sentence.

And experience has proved that these claims are meritorious in an alarming number of capital cases. As Justice Stevens noted in *Giarratano*, a 1988 study found that the success rate in federal *habeas* proceedings in capital cases

ranged from 60% to 70% during the first decade following the reinstatement of the death penalty in 1976. 492 U.S. at 24 (Stevens, J., dissenting); *see also McFarland v. Scott*, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Of the capital cases reviewed in federal *habeas* corpus proceedings between 1976 and 1991, nearly half (46%) were found to have constitutional error."). There can be no serious dispute that first-time state *habeas* claims in capital cases are critically important. In an increasing number of cases, however, there are no lawyers available to help death row inmates investigate, prepare, or prosecute their claims.

B. Many death row inmates currently do not have counsel for the preparation and prosecution of initial state *habeas* claims.

Exzavious Gibson is not alone in his inability as an indigent death row inmate to find a lawyer to assist him in the preparation and prosecution of initial state *habeas* claims. Many States provide little or no legal assistance to individuals on death row following trial and direct appeal. And, although volunteer counsel often have been found, there is an increasing number of inmates on death row who do not have, and never have had, a lawyer to represent them in connection with initial state *habeas* claims.

The ABA is in a unique position through its Death Penalty Representation Project to assess the availability of counsel for persons on death row following their direct appeal. In early 1998, the Project renewed its efforts to recruit volunteer counsel and made that goal its highest priority. Since that time it has enlisted more than 40 law firms to serve as volunteer counsel in post-conviction capital cases. In addition, the Project now funds five "resource counsel" at non-profit capital representation offices in four states and will shortly fund a

"resource counsel" in a fifth state. Unfortunately, these efforts, and those of other non-profit organizations working in particular States, do not begin to meet the enormous need for counsel. This is particularly true as a result of recent legislative changes that have reduced resources for capital representation projects and have made it increasingly difficult for volunteer counsel to handle a capital case.

Between 1988 and 1995, Congress provided federal funding for 20 capital post-conviction resource centers. That appropriation substantially increased the number of trained lawyers providing direct representation to death row inmates in collateral review proceedings, and was particularly effective in supporting the efforts of volunteer and court-appointed counsel. In 1996, however, Congress eliminated all federal funding for the resource centers, *see* Pub. L. No. 104-91, 110 Stat. 7 (1996), and most closed their doors by mid-year. To the extent these offices exist today, the overwhelming majority operate with a skeleton staff and little or no financial assistance from the States.

The situation became even more urgent with the passage in April 1996 of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996). Among other things, the AEDPA provides a one-year statute of limitations for the filing of federal *habeas* actions. 28 U.S.C. § 2244(d)(1). For many inmates presently on death row, the clock now is ticking under the AEDPA and no post-conviction petition has yet been filed. Although a state court *habeas* filing tolls the AEDPA statute of limitations, many States have enacted filing deadlines even more rigorous than the AEDPA. *See, e.g.*, Ill. Comp. Stat. 725 § 5/122-1 (post-conviction petition generally must be filed within 45 days of filing of defendant's direct appeal brief); Ariz. Rev. Stat. § 13-4234(D) (post-conviction petition must be filed only 60 days

after disposition of direct appeal); Tex. Code Crim. P. Ann. art. 11.071 § 4(a); Va. Code Ann. § 8.01-654.1.

The AEDPA also tightens the relationship between state and federal *habeas*, and makes the assistance of counsel in state *habeas* critical to the entire post-conviction review process. The AEDPA provides that "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). This presumption may be overcome only by clear and convincing evidence. *Id. See also id.* § 2254(d) (providing that federal *habeas* relief shall not be granted with respect to any claim adjudicated on the merits in state court proceedings unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

As a result of these legislative developments, it is increasingly difficult to find volunteer counsel willing to assume responsibility for a post-conviction death penalty case. For volunteer counsel, the investment of time -- which amounts to hundreds, if not thousands, of hours -- now must often be compressed into a very short time period, and there is far less support available from experienced death penalty resource centers. As a result, there currently are many death row inmates in several States who have *no* lawyer to assist them in connection with their initial state *habeas* claims. For example:

- In Georgia, the loss of federal funding for the Georgia Resource Center in 1996, and the enactment at the same time of a new state rule expediting post-conviction proceedings in capital cases, *see* Ga. Super. Ct. Rule 44 (effective Jan. 11, 1996), have had a dire impact on the

availability of counsel to assist death row inmates. This is demonstrated most dramatically by the instant case, where Exzavious Gibson was forced to stand alone at his post-conviction hearing, offering little more than "I don't know what to plead." *Gibson v. Turpin*, No. 95-V-648, Transcript of Hearing, 2-3 (Sept. 12, 1996, Superior Court of Butts County, Georgia). By the end of the year, there will be no fewer than eight death row inmates who have completed direct review and will be without counsel for state post-conviction proceedings.

- In Alabama, there are approximately 186 prisoners sentenced to death. While the elimination of the state resource center has made it impossible to track precisely the number of death row inmates currently without lawyers, it is fair to say that there are at least 30 individuals who are, or within the next six months will be, in jeopardy of running the federal statute of limitations without counsel to file state post-conviction petitions. State resources for indigent capital representation are virtually non-existent, and appointment of counsel is wholly discretionary. *See* Ala. Code § 15-12-23. In addition, in those cases where counsel is appointed, fees are capped at $1000. *Id.*

- In Pennsylvania, an extreme shortage of resources has made it impossible to track the number of death row inmates without lawyers. About half of Pennsylvania's 200 death row inmates lacked counsel even *before* the state resource center lost its federal funding in 1996. The crisis has only deepened since then. In 1997, the Pennsylvania legislature defeated a measure to provide state funding for post-conviction representation of indigent death row inmates. The capital resource center briefly managed to subsist on private funding, but on June 15, 1999, it permanently closed its doors due to lack of funds.

In sum, the constitutional question raised by Exzavious Gibson has broad impact beyond this case.

II. There Is a Substantial Constitutional Basis for Recognition of a Right to Counsel for the Pursuit of Initial State *Habeas* Claims in Death Penalty Cases.

It is the position of the American Bar Association that the contemporary standards of decency encompassed within the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. 86, 101 (1958), dictate that no person should face the executioner alone: attendant to the State's power to impose the ultimate punishment of death is the obligation to ensure that counsel is available for the condemned at all proceedings where the inmate's substantial rights are determined, however those proceedings may be defined by state and federal law. *See Resolution of the ABA House of Delegates* 102B (1979) (urging adoption of a rule "providing for appointment of counsel to prepare petitions for discretionary review of state court convictions, including appropriate post-conviction or clemency petitions, if necessary, in death penalty cases where the defendant cannot afford to hire counsel"). Indeed, certain constitutional rights of the condemned are not implicated, and therefore remain at issue, until the time of execution. *See Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986) (Eighth Amendment forbids execution of one who is mentally incompetent at the time of execution). At least 80 people sentenced to death since the reinstatement of capital punishment have been exonerated, many of them long after their direct appeals were complete.

This case, however, involves a much narrower right. The issue here is whether an indigent death row inmate may be executed where critical constitutional claims that go directly to the reliability of the underlying conviction and death sentence

have never been heard with the assistance of counsel. The ABA submits there is a substantial constitutional basis for a limited exception to the rule of *Pennsylvania v. Finley*, 481 U.S. 551 (1987), which held there is no general right to counsel in post-conviction proceedings.

A. Recognition of a right to counsel for an indigent party generally is dependent on the nature of the underlying interest and the importance of counsel to a fair determination of the proceedings.

"Courts have confronted, in diverse settings, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996) (quoting *Griffin v. Illinois*, 351 U.S. 12, 16 (1956)). Although the Constitution may not guarantee a particular form of state review, "once a State affords that right, *Griffin* held, the State may not 'bolt the door to equal justice.'" *M.L.B.*, 519 U.S. at 110 (quoting *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in the judgment)).

In certain circumstances, the right of meaningful access to the courts guaranteed by the Equal Protection Clause encompasses a right to the assistance of counsel. In *Douglas v. California*, 372 U.S. 353 (1963), the Court held that an indigent criminal defendant may not be denied the assistance of counsel in connection with his first appeal as of right, on the ground that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'" *Id.* at 355 (quoting *Griffin*, 351 U.S. at 19). The Court emphasized the difference between prosecuting a criminal appeal with the benefit of counsel, and doing so without:

> [T]he rich man . . . enjoys the benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent . . . is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.

Douglas, 372 U.S. at 357-58. The Court noted that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them." *Id.* at 357. But the Court emphasized that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* (emphasis in original).

Since *Douglas* this Court has continued to view the "initial appeal as of right" as distinct in terms of the State's obligation to provide counsel to ensure meaningful access. *See Ross v. Moffitt*, 417 U.S. 600, 615 (1967) (no right to state-provided counsel on discretionary review to state supreme court); *Finley*, 481 U.S. at 556 (no right to state-provided counsel on state collateral review). Both *Ross* and *Finley* emphasized that the defendants in those cases already had been assisted by counsel in pursuing the *same* claims during a previous appeal, and thus were likely to have access to a transcript from their trial, an appellate brief on their behalf, and an opinion disposing of their case. *See Ross*, 417 U.S. at 614-15; *Finley*, 481 U.S. at 557.

More recently, in *Coleman*, the Court again addressed an inmate's right to counsel in state *habeas* proceedings. It found no right to counsel to pursue an appeal of an adverse ruling of the state *habeas* trial court, even though the claims at issue were first-time *habeas* claims that could not have been brought on direct appeal. *Coleman*, 501 U.S. at 752. The Court rested

that ruling, however, on the ground that the decision of the state *habeas* trial court was itself the equivalent of an "appeal" of the underlying criminal conviction, and the petitioner had been afforded the assistance of counsel in connection with that "appeal." As explained by the Court: "Coleman has had his 'one and only appeal,' if that is what a state collateral proceeding may be considered. . . . What Coleman requires here is a right to counsel on appeal from *that* determination. Our case law will not support it." *Id.* at 756 (emphasis in original).

Crucial to the *Coleman* decision, therefore, was that counsel had been provided in the state *habeas* trial court. Exzavious Gibson had *no* counsel at that stage. Thus, the Court in *Coleman* expressly did not decide the question presented here, *i.e.*, whether "there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction." *Coleman*, 501 U.S. at 755. Where, as here, those initial state *habeas* claims could not have been brought on direct review, and therefore the initial state *habeas* hearing *is* the equivalent of the inmate's "one and only appeal," the decisions from *Douglas* through *Coleman* compel the conclusion that counsel must be afforded to an indigent death row inmate.

This Court's due process jurisprudence also supports recognition of a right to counsel in the first state *habeas* proceeding in a capital case. For example, in *In re Gault*, 387 U.S. 1, 41 (1967), the Court held that the Due Process Clause requires appointment of counsel for a child in a juvenile delinquency proceeding that may result in confinement, despite "the 'civil' label-of-convenience which has been attached to juvenile proceedings." *Id.* at 50. The Court again relied upon the critical importance of counsel in this setting: "The juvenile

needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Id.* at 36. In other settings involving important underlying interests, the Court has recognized a conditional right to counsel dependent upon the nature and complexity of the particular case. *See, e.g., M.L.B.*, 519 U.S. at 117 (characterizing *Lassister,* 452 U.S. at 31-32, as recognizing a due process right to counsel in parental termination cases "when warranted by the character and difficulty of the case"); *Gagnon*, 411 U.S. at 790 (recognizing a due process right to counsel in probation and parole revocation hearings when dictated by "fundamental fairness").

As this Court has recognized, cases involving rights of access to judicial processes "'cannot be resolved by resort to easy slogans or pigeonhole analysis,'" *M.L.B.*, 519 U.S. at 120 (quoting *Bearden v. Georgia*, 461 U.S. 660, 666 (1983)), but two factors pervade the analysis. First, is an assessment of the importance of the underlying interest. *See, e.g., In re Gault*, 387 U.S. at 36 (child may be "subjected to the loss of his liberty for years"); *Lassiter*, 452 U.S. at 27 ("[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one"). Second, the Court has considered the extent to which counsel is necessary to protect the rights of the indigent party. *Compare Douglas*, 372 U.S. at 358 (without counsel, first appeal is "a meaningless ritual"), *with Gagnon*, 411 U.S. at 787-88 (recognizing a right to counsel in some, but not all, probation and parole revocation proceedings because in many cases the alleged violation is already established and there is less need for counsel). Employing that framework, the Court should recognize a right to counsel in the limited context at issue here.

B. The nature of the underlying interest and the importance of counsel in the setting presented here provides a compelling basis for an exception to the *Finley* rule in capital cases.

This case presents a particularly compelling basis for recognition of an indigent party's right to counsel: there are few interests more substantial than the fair administration of the death penalty, and few instances in which the assistance of a lawyer is more indispensable than the pursuit of post-conviction claims, including ineffective assistance of counsel claims, that could not have been raised on direct appeal.

This Court long has recognized that "death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion); *see also Lankford v. Idaho*, 500 U.S. 110, 125 (1991) (same). This fundamental difference creates a greater "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

Imposition of the death penalty also "places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death." *Giarratano*, 492 U.S. at 8 (plurality opinion). Perhaps most notably, although there generally is no constitutional right to appeal a criminal conviction, "meaningful appellate review" in capital cases "serves as a check against the random or arbitrary imposition of the death penalty," *Gregg v. Georgia*, 428 U.S. 153, 195, 206 (1976) (plurality opinion), and is an integral component of a State's "constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion). Thus, the interest in

ensuring the validity of a death row inmate's conviction and sentence is of the highest magnitude.

In addition, the claims sought to be raised in these initial state *habeas* proceedings cannot be brought successfully without a lawyer, both because of the nature of the underlying claims and because of the complexities of post-conviction and death penalty law. First, with respect to the underlying ineffective assistance of counsel claims that are often at issue, this Court has recognized that a "layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance." *Kimmelman*, 477 U.S. at 378. Second, the complexities of *habeas corpus* and death penalty law also create a special need for the guiding hand of counsel. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment) ("The complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.").

In sum, it is hard to imagine a proceeding for which counsel is more necessary. It is noteworthy that Congress has recognized these principles in creating a statutory right to counsel in federal *habeas* proceedings in death penalty cases. *See* 21 U.S.C. § 848(q)(7) (expressly noting "the seriousness of the possible penalty and . . . the unique and complex nature of the litigation"); *see also Jackson v. Mississippi*, 732 So. 2d 187, 188 (Miss. 1999) (holding that "the nature of death penalty litigation in the courts of this State, coupled with the ultimate penalty the State seeks to impose," requires recognition of a constitutional right to counsel in capital post-conviction proceedings).

Recognition of a right to counsel in this setting would not necessarily dictate the manner in which counsel is provided.

This Court frequently has emphasized that States must be afforded flexibility in ensuring that indigent litigants are afforded meaningful access to the courts. *See, e.g., M.L.B.*, 519 U.S. at 112 n.5 (right to meaningful access does not impose an inflexible requirement that a State provide a full trial transcript); *Giarratano*, 492 U.S. at 13 (O'Connor, J., concurring) (States have "considerable discretion in assuring ... meaningful access to the judicial process"); *id.* at 14 (Kennedy, J., concurring in the judgment) ("The requirement of meaningful access can be satisfied in various ways . . . ."). States may be able to satisfy their obligation to ensure death row inmates access to the courts by funding resource centers and public defender organizations to work with the private bar to provide representation to indigent death row inmates. But, as this case illustrates, it cannot be constitutional for the State to do *nothing*, leaving an indigent death row inmate like Exzavious Gibson totally alone to prosecute his "one and only appeal" of first-time *habeas* claims. If that result is constitutionally permissible, it too readily may become the norm for *all* capital cases, even in States that presently provide some level of support.

For these reasons, the ABA submits that an indigent death row inmate must be afforded counsel to pursue his initial state post-conviction claims. The ABA urges the Court to grant the petition and consider this important constitutional question, which is critical to the integrity of our capital punishment system. Nothing will be served by allowing an increasing number of these cases to flounder through the state courts without counsel, creating new problems for federal *habeas* and potentially prolonging the ultimate resolution of these cases before the issue finally is resolved by this Court.

CONCLUSION

The ABA respectfully urges the Court to grant the petition.

Respectfully submitted,

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SEPTEMBER 8, 1999

Supreme Court, U.S.
FILED
SEP 24 1999
OFFICE OF THE CLERK

No. 99-77

IN THE

Supreme Court of the United States

EXZAVIOUS LEE GIBSON,

Petitioner,

v.

TONY G. TURPIN, WARDEN,
Georgia Diagnostic and Classification
Center,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

The State's Opposition avoids defending the shocking rule announced below by attempting to create uncertainty as to the facts of this case. The State offers sheer speculation and suspicion as a basis to urge the Court to decline review and wait for a case with "better facts." The State cannot, however, obfuscate the two core facts that frame the question presented:

> (1) Mr. Gibson did not have an attorney in his state habeas proceedings; and
>
> (2) State habeas was Mr. Gibson's first opportunity to raise his ineffective assistance of counsel claims and other claims that were never investigated.

The State's position is not that these core facts fail to raise vital constitutional issues on which this Court has reserved ruling or that they fail to implicate important federalism concerns. Instead, the State simply claims to doubt the accuracy of the core facts and complains that they have never been subject to evidentiary development.

The State's position simply ignores the core facts of this case in an attempt to divert the Court's attention with baseless speculation and suspicion. The record in this case demonstrates with clear and sorrowful eloquence that Mr. Gibson was without counsel. The record is clear that no attorney entered an appearance on Mr. Gibson's behalf and that no attorney represented Mr. Gibson at his habeas hearing. Further, the record is clear that Mr. Gibson had the same lawyer throughout direct review and, therefore, state habeas was his first opportunity to raise ineffective assistance of counsel claims.

That any number of lawyers in the country theoretically could have volunteered their services to Mr. Gibson does not change the fact that he did not have a lawyer. The State's stubborn disbelief that attorneys were unavailable is irrelevant. The State's argument that Mr. Gibson theoretically could have raised his ineffective assistance claims in a motion for new trial

is equally irrelevant. He could have raised this claim only if he had a new lawyer. Because he was not provided with a new lawyer, state habeas was his first opportunity to raise those claims.

At bottom, the State's position is that the Court should defer addressing the question presented until a case with more developed facts arrives. The problem is that cases in this posture will not have the factual record the State demands. Cases in this posture cannot be expected to have, for example, the "types of information and statistics" the State now deems necessary because there will have been no adversarial process in which to develop such facts. Moreover, the issues in this case are extremely unlikely to ascend to the Court from a federal habeas hearing because of the *Teague* bar and related default rules. If the record in Mr. Gibson's case fails to raise the question presented, it is difficult to conceive of what case could meet the high standard the State would impose.

Although the State made the same arguments below, the Georgia Supreme Court squarely held, in direct conflict with the Mississippi Supreme Court, that the denial of counsel in capital habeas proceedings does not violate the U.S. Constitution. The one thing the State seems unwilling to do is defend the Georgia Supreme Court's conclusion.

ARGUMENTS IN REPLY

I. MR. GIBSON WAS NOT REPRESENTED BY AN ATTORNEY AND, THEREFORE, THIS CASE PRESENTS THE QUESTION LEFT OPEN IN *GIARRANTANO*

The State contends that Mr. Gibson essentially waived any right to counsel, that he had "*de facto*" representation of counsel, and that there were lawyers available who could have represented him. Thus, the State concludes that "[p]etitioner's

case does not present the question left open by *Giarrantano*."[1] (Brief in Opp. at 13). Importantly, the State does not contest that this question was left open or that its resolution is vital to the administration of justice in this country. Instead, it simply attacks the plain fact that Mr. Gibson did not have attorney.

A. Mr. Gibson Did Not Have An Attorney

The record unambiguously demonstrates that no attorney ever entered an appearance on Mr. Gibson's behalf. Most importantly, the record unambiguously demonstrates that no attorney represented him at his habeas evidentiary hearing. (*See* App. at A91-A148). The State ignores these plain facts and, instead, attempts to create confusion about a number of other matters that are not in the record and that are irrelevant to whether this Court should grant certiorari.

First, the State suggests impropriety by alleging that the filing of Mr. Gibson's habeas petition was a "maneuver" that was "contrived" to "circumvent new capital habeas timelines." (Brief in Opp. at 1; *see also* Brief in Opp. at 3, 5, 13). As a threshold matter, the timing of Mr. Gibson's habeas petition does not alter the fact that he did not have an attorney.

Further, there was nothing sinister about Mr. Gibson filing his petition to avoid Georgia's new expedited capital habeas procedures. In fact, it was laudable. Under the practice and procedure in effect prior to Rule 44, habeas trial courts enjoyed flexibility to grant continuances that allowed capital habeas petitioners sufficient time to secure counsel before an evidentiary hearing. Rule 44, which became effective on January 1, 1996, severely restricts this flexibility by imposing rigid, expedited timelines under which habeas cases must proceed. Accordingly, eleven death row inmates in Georgia who did not have attorneys filed materially identical form,

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[1] *Murray v. Giarrantano*, 492 U.S. 1 (1989).

"skeletal" habeas petitions in December 1995.[2] These filings were perfectly appropriate -- they were good faith attempts to ensure that the habeas court would have sufficient scheduling flexibility to allow the inmates to find volunteer counsel.

The State also suggests that Mr. Gibson brought his lack of counsel problems on himself by filing his habeas petition pro se before an execution date had been scheduled. (Brief in Opp. at 1, 2, 5, 12-13). In this regard, the State contends that he was not "forced" to proceed without counsel, but instead "voluntarily" chose to proceed without counsel. (Brief in Opp. at 12). That Mr. Gibson voluntarily filed his petition does not alter the fact that he did not have an attorney -- there can be no credible argument that, assuming there is a right to counsel, Mr. Gibson waived this right by filing the petition in accordance with the rules. The question is not whether Mr. Gibson voluntarily filed his petition, it is whether the constitution permits his being forced to proceed through investigation, discovery, and an evidentiary hearing without a lawyer.

Next, the State contends that Mr. Gibson had "*de facto*" representation by the Resource Center (Brief in Opp. at 12, 13-14) and that the Resource Center's amicus curiae status "was nothing more than a ruse to hide the fact that the Resource Center was functioning as counsel." (Brief in Opp. at 13).

The narrowest necessary response to the State's allegations is that the record shows no entry of an appearance by an attorney on Mr. Gibson's behalf and that the transcript of the state habeas evidentiary hearing unambiguously proves that

Mr. Gibson was not represented at the hearing and was forced to proceed alone.[3]

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[2] In addition to the eleven *pro se* petitions, four petitions were filed by volunteer counsel to precede the January 1, 1996 deadline.

[3] The State claims that the Resource Center "addressed the Court on Petitioner's behalf" at the habeas evidentiary hearing. (Brief in Opp. at 7).

However, beyond these unambiguous record facts, the State's contentions amount to nothing more than speculation and suspicion. That the Resource Center provided Mr. Gibson with a form, skeletal pleading -- which did not contain any allegations particular to his case and which was materially identical to ten other habeas petitions filed that day -- is irrelevant. It does not matter where he acquired form pleadings, whether from a book, an attorney, or another inmate. It is equally irrelevant that the Resource Center filed boilerplate motions as amicus curiae requesting continuances in order to find volunteer counsel. The fact is that an attorney never entered an appearance on Mr. Gibson's behalf. The only issue is whether the State was required to provide an attorney.

Finally, the State contends that the Center for Prisoners' Legal Assistance, Inc. (the "CPLA") was available to take Mr. Gibson's case. (Brief in Opp. at 6, 7 n. 7, 15 n. 12, 16-17). Of course, theoretically, every practicing attorney in the country could have taken Mr. Gibson's case -- but the core fact is that none of them did. The CPLA (or its predecessor) has never voluntarily represented death row inmates in habeas proceedings and there is nothing to suggest it ever will. Careful examination of *State v. Davis*, 246 Ga. 200, 269 S.E.2d 461 (1980) -- the case cited by the State to show that the CPLA can take capital habeas cases -- reveals that the Georgia Supreme Court reversed the habeas court's appointment of the CPLA's predecessor to represent a capital habeas petitioner.

Even a cursory review of the hearing transcript makes clear that the Resource Center attorney simply stood up in the public seating area of the courtroom and pleaded with the court to grant a continuance so that Mr. Gibson would have time to secure an attorney. (App. at A93-A104). The Resource Center attorney, who was physically removed from the courtroom before the conclusion of the hearing, obviously did not represent Mr. Gibson at the hearing.

B. This Case Falls Squarely Within The Question Left Open By *Giarrantano*

Because the State contends that Mr. Gibson chose to proceed without counsel, was represented by counsel, or could have been represented by counsel, it concludes that this "case thus does not present the question left open by *Giarrantano*."

The factual circumstances set forth in *Giarrantano* are present in this case. First, as discussed *supra*, Mr. Gibson was not represented by counsel in his habeas proceedings and, in particular, in his habeas evidentiary hearing. In *Giarrantano*, Virginia death row inmates brought a § 1983 action to compel the State to provide attorneys. Virginia law authorized the appointment of counsel, and the Court made clear that such appointments had been made upon request in every case. *Id.* at 10 n. 5. Unlike the inmates in *Giarrantano* who were requesting prospective relief, Mr. Gibson has already been denied an attorney.

Second, as discussed above, Georgia's prison system is not staffed with institutional lawyers to assist in preparing petitions for post-conviction relief. Unlike the "Unit Attorneys" in *Giarrantano*, the CPLA in Georgia has never voluntarily represented death row inmates in capital habeas cases, and the Georgia Supreme Court reversed the one case in which the CPLA's predecessor was appointed to represent them. That the CPLA, just like every other practicing attorney in the country, remains theoretically available to provide representation is not enough to take this case outside of *Giarrantano*. The question is whether the U.S. Constitution has been violated if no attorney provides representation.

Finally, the State argues that Georgia's system of providing $300,000 to the Resource Center falls within the State's "wide discretion to select appropriate solutions." *See Giarrantano*, 492 U.S. at 14. (Brief in Opp. at 14). Once again, the *fact* is

that the Resource Center did not represent Mr. Gibson. Moreover, the Resource Center's charter is simply to track and monitor capital litigation in Georgia and to provide expert assistance to attorneys who volunteer to represent indigent, death-row inmates (App. at A2 n. 1), not to represent every death row inmate in Georgia.[4]

II. STATE HABEAS WAS MR. GIBSON'S FIRST OPPORTUNITY TO RAISE HIS INEFFECTIVE ASSISTANCE CLAIMS AND, THEREFORE, THE CASE PRESENTS THE QUESTION LEFT OPEN IN *COLEMAN*

The State argues that this case does not present the issue reserved in *Coleman*[5] because inmates in Georgia theoretically are able to present ineffective assistance claims in a motion for new trial. (Brief in Opp. at 15-17). Indeed, the State goes so far as to posit that Mr. Gibson was "free to secure new counsel for his motion for new trial and direct appeal." (Brief in Opp. at 9).

This theoretical argument ignores the poverty and powerlessness of death row inmates such as Mr. Gibson. Mr. Gibson is indigent and could not possibly have hired his own attorney. Further, it is disingenuous to expect that he could have figured out for himself that he potentially could have asked for a new lawyer. Perhaps Mr. Gibson's trial attorney was constitutionally ineffective for failing to notify him of this

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[4] That the State suggests this $300,000 appropriation could come close to satisfying its constitutional obligation to Georgia's 120 death row inmates is absurd. The Capital Collateral Regional Counsel organization in Florida, which represents 208 death row inmates, had an $8 million budget. A report submitted in connection with a request to stay all executions in Florida due to insufficient funding found that this $8 million budget was "woefully inadequate" to provide competent capital post-conviction representation. *Arbelaez v. Butterworth*, 1999 WL 419331 (Fla. 1999) (Anstead, J., concurring). The case was subsequently mooted when this funding was increased. *Id.*

[5] *Coleman v. Thompson*, 501 U.S. 722 (1991).

potential right, but this can never be tested under the State's view because Mr. Gibson will never have an attorney to prove it.

Further, that Mr. Gibson theoretically could have secured a new attorney to file a motion for new trial is irrelevant. The core fact is that he did not secure such an attorney. State habeas remains the most common, practical, and accepted vehicle to test the constitutionality of trial counsel's performance, and under Georgia law, ineffective assistance of counsel cannot be raised unless there has been a change of counsel from the trial court. *See, e.g., Harrison v.* State, 201 Ga. App. 577, 581, 411 S.E.2d 738, 741-42 (1991); *Castelle v. Kemp*, 254 Ga. 556, 331 S.E.2d 528, 530 (1985).

III. NO FURTHER EVIDENTIARY DEVELOPMENT IS NECESSARY TO FRAME THE QUESTION PRESENTED

In essence, the State's position is that the Court should not review this case because further development of certain facts is necessary for that review. For example, the State controverts the evidence indicating that Mr. Gibson is borderline mentally retarded. (Brief in Opp. at 1, 8 n. 8). The State also "seriously doubts" that counsel could not be found and guesses that the Resource Center was covertly representing Mr. Gibson. (Brief in Opp. at 7, n. 7, 12, 14-15). The State even argues that because the right to counsel issue was not before the habeas trial court, "the record in the habeas corpus court below was never developed with the types of *information and statistics* which would be necessary if a court were to examine the question whether a capital post-conviction petitioner has a constitutional entitlement to counsel."[6] (Brief in Opp. at 25) (emphasis added).

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[6] The State's contention that the right to counsel issue was not before the habeas trial court is belied by the transcript of the hearing. (*See* App. at A95 (State's attorney arguing that Mr. Gibson has no constitutional right to counsel in habeas proceedings)).

With a case in this posture, the type of factual record sought by the State will rarely, if ever, exist. There was no attorney in the habeas trial court to create the factual record the State now claims is a necessary predicate to this Court's review. Without an attorney below, the Court will never face a case with the statistical and factual development the State now demands. Indeed, the State argued the right to counsel issue below (App. at A95), but did not introduce in that one-sided proceeding the very evidence it now considers indispensable.

Importantly, a federal habeas court will be unlikely to address directly the constitutionality of a state's denial of habeas counsel. If a federal habeas court were inclined to hold that a petitioner's constitutional rights were violated when the State deprived him of habeas counsel, this holding arguably would be barred by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *See Sims v. Singletary*, 155 F.3d 1297, 1309 (11th Cir. 1998) (noting that the court need not even reach the merits of *Teague*-barred issues).

In sum, if the record in Mr. Gibson's case fails to raise the question presented, it is difficult to conceive of what case could meet the high standard the State would impose. None of the State's speculation and suspicion alter the core facts of this case, which appear unambiguously in the record.

IV. THE GEORGIA AND MISSISSIPPI SUPREME COURTS OBVIOUSLY ARE IN CONFLICT

In support of its argument that there is no conflict between the Georgia and Mississippi Supreme Courts, the State claims that *Jackson v. Mississippi*, 732 So.2d 187 (Miss. 1999), is "based on circumstances unique to the nature of death penalty litigation in Mississippi." (Brief in Opp. at 18, 20-21).

This argument proves nothing. It is axiomatic that the Mississippi Supreme Court only addressed the death penalty system in Mississippi. Under the State's view, there would

only be a split of opinion among state courts if those courts reached out and held that laws in other states were unconstitutional. The only specific differences between Georgia and Mississippi cited by the State are illusory. (*See* Brief in Opp. at 20-22). Just as in Mississippi, collateral review has become "part of the death penalty appeal process" in Georgia because that is where the overwhelming majority of collateral attacks are mounted. Just as in Georgia, ineffective assistance claims in Mississippi theoretically can be raised on direct review if sufficient factual development is available.

The State also mildly suggests that the Mississippi opinion "may not have been founded upon the federal constitution." (Brief in Opp. at 18 n. 15, 19-20). This argument is belied by the court's opinion. (App. at A82-A90). The opinion never even mentions the Mississippi Constitution. The only constitutional law discussed is federal constitutional law, and the court explicitly based its decision on *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) and *Murray v. Giarrantano*, 492 U.S. 1 (1989).[7]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant certiorari in this case.

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[7] The State also suggests that certiorari on a denial of discretionary review is inappropriate. To the contrary, the Georgia Supreme Court squarely addressed the question presented in a lengthy, clear, and published opinion, and the Court has taken other cases in precisely this posture. *See, e.g., Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

Respectfully submitted,

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Dated: September 24, 1999